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In the Light of the Crimean Crisis will International Law have to accept that it is to the Advantage of the Citizens of Crimea that, in this Case, the Law of State Succession applies *De Facto* in Preference to that of Occupied Territory Law?

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A Introduction

Between 21 November 2013 and 18 March 2014 Crimea underwent a crisis of independence, from a self-declared independent state to an entity of Russia. This has in turn led to a crisis in international law.

The Peninsula of Crimea is situated on the northern shore of the Black Sea and it is contiguous with the territory of Ukraine. To the east of the peninsula the narrow Kerch Strait separates Crimea from mainland Russia – its only other near neighbour. Despite a relatively small extent of approximately 27 000 km² and having a population of 2,35 million, Crimea has continued to occupy a prominent place in history. In the current decade the incidents in Crimea represent a major crisis of our time. The crisis has led not only to geographical and political changes; it has also had a profound effect from the perspective of international law.

Tsarina Catherine II conquered Crimea from the Ottoman Empire in 1783 and until 1954 the peninsula was an integral part of Russia. Following a decision of the Supreme Soviet in 1954, Nikita Khrushchev awarded the peninsula to Ukraine. After the independence of the Ukraine in 1991, Crimea remained part of the territory of the new republic. In 1992, however, it gained the status of an autonomous republic with Simferopol as its administrative capital. Since 1996, the Republic of Crimea has had its own constitution, parliament and government as well as enjoying additional further autonomous rights. But Russian influence in Crimea did not end after the breakdown of the Soviet Union. This continuing influence is illustrated by the fact that since 1997 Ukraine has contractually prescribed that the Russian Federation's navy be allowed to deploy her Black Sea Fleet at the Port of Sevastopol.

Not only has the past history of the peninsula contributed to the current crisis, its geographical position and social situation are also major contributory factors. Because Crimea lies at the edge of the Russian Federation, it marks not only a

geographical border but also a limit of political and social understanding. Moreover, it can be seen as the watershed between West and East. This interface is indicated especially by the ethnic mixture of the peninsula's population: 60% of the inhabitants are Russians, 25% Ukrainians and 12% Tartars. These factors demonstrate the overwhelming economic and political influence of Russia in this region, which then came to a head with the "annexation of Crimea" by Russia in 2014.

This conflict has brought about the most serious post-Cold War security crisis between Russia and the West to date.[1] The real threat is that President Vladimir Putin could continue to translate his nostalgia for the old Soviet Union into action. While policymakers in the United States and Russia have cautioned against drawing Cold War parallels, numerous analysts in both countries have proclaimed the start of a new Cold War in light of the resulting rapid deterioration in relations between Moscow and Washington.[2]

Ukraine has also assumed greater importance due to geo-strategic interests. The country is torn between the European Union (EU), on the one hand, and Russia, on the other. For the EU, Ukraine represents a potential candidate for future inclusion, whereas for Russia it represents a bulwark against further Western influence. The concept of "near-abroad" – an extraterritorial sphere of influence that includes Eastern European states where Moscow considers itself entitled to interfere – is still upheld by Russia; this means that the neutrality of any remaining states in this sphere is insisted upon by Russia, effectively denying them the ability to ally themselves with Western entities.[3] In the past years Ukraine also appeared to lean more and more towards the EU. The Ukraine government discussed the possibility of the country becoming part of the EU at great length. Russia regarded this potential expansion of the EU right up to its borders as an unacceptable threat to Russian security. For this reason, the concept of "near-abroad" became increasingly important.

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[1] R Geiss. 2015. Russia's Annexation of Crimea: The Mills of International Law Grind slowly but they do Grind. *International Law Studies* 91: 426.
[2] BN Mamlyuk. 2015. The Ukraine Crisis, Cold War II and International Law. *German Law Journal* 16(3): fn 80.
[3] N Davies. 2012. *Vanished Kingdoms: The History of Half-forgotten Europe.* London: Penguin Books, 695; C Marxsen. 2014. The Crimea Crisis – An International Law Perspective. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 74: 367.

The roots of the crisis are multi-dimensional and may even be considered to include – among other things – the ongoing friction caused by Russia's granting of asylum to WikiLeaks fugitive, Edward Snowden, and its support for Bashar al-Assad in the civil war in Syria. Add to this the centuries-old rivalry between Ukraine and Russia and the Russian view of Ukraine as the origin of their language and statehood, and Russia's fatally assuming that they represent the same people. Another important factor is that the crisis cannot be understood without analysing purely socio-economic conditions and the debate over regional trade integration.

The influence of the crisis in Crimea at an international level should also not be underestimated. The crisis produced vehement political discussions which placed the question of international law at the focus of the public domain. The legal problems which were caused and discussed during the crisis are set out in this dissertation. Furthermore, this dissertation aims to identify the legal consequences of the crisis which do not currently form a major part of the legal discussion.

In the first part of the thesis, I give a historic overview of the events which took place at the beginning of 2014. This is followed by the examination of the legal status of Crimea which under international law is currently controversial and dependent upon one's point of view. The question is: Is Crimea part of Russia or is it still Ukrainian territory, or what other status could it have? Only after answering this question is it possible to examine the legal consequences of the crisis and the legal problems which were caused. The focus is on the citizenship and rights of the inhabitants of Crimea.

Surprisingly, the articulation of various economic and political claims in narrow international legal terms rapidly catapults an otherwise purely domestic matter into the realm of international law, provided various international legal actors are prepared to entertain those claims or honour various interests.

What has to be examined is whether the traditional international law instruments are still applicable.[4] A further challenge to have arisen in recent years reached its first climax in the Crimea crisis in the form of the return of renewed East–West conflict, which can influence the international law.

[4] P Hilpold. 2015. Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn from History. *Chinese Journal of International Law* 14(2): 1.

B A Historical Overview of the Events of Early 2014

On 21 November 2013, Ukraine's President Victor Yanukovych decided not to sign the association agreement with the EU. The reasons given for his decision were to take note of national interests and the need to improve Ukraine's relationship with Russia and the Community of Independent States.[5] In its place, the president signed a treaty and a multi-billion dollar loan agreement with Russia. These actions by Yanukovych triggered country-wide street protests led by the "Euromaidan" protest movement. Attempts at using the police force to stem the protests only fanned the flames. On 21 February 2014, Yanukovych and representatives of the opposition – with the assistance of the Secretaries of State of Germany, France and Poland – signed an agreement to settle the crisis in Ukraine. The key points of the agreement were:

- within ten days a government of national unity should be formed to begin working on constitutional reforms;
- early presidential elections should be held, and
- acts of violence on both sides should be clarified.

However, this agreement did not satisfy the protesters and they continued to demand Yanukovych's resignation. After signing the agreement and fearing the protesters' revenge, Yanukovych fled Kiev for Russia. As a result of his flight and his inability to perform his function, the Ukraine Parliament by constitutional majority on 22 February 2014 declared the president deposed. A new government led by interim president Andresij Jazenjuk was formed and police and military forces were withdrawn. The new government was broadly inclusive of the political forces in Ukraine which sought a "European" orientation for the country while at the same time rejecting closer economic and political integration with Russia;[6] national elements were also represented.[7] During the protests approximately 100 peaceful demonstrators had been killed and thousands injured by armed police and military forces.[8]

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[5] V Motyl. 2015. Annexion der Krim und Anwendung militärischer Gewalt durch Russland gegen die Ukraine: Gibt es eine völkerrechtliche Rechtfertigung dafür? *Zeitschrift für Aussen und Sicherheitspolitik* 8(3): 316.
[6] PM Olson. 2014. The Lawfulness of Russian Use of Force in Crimea. *Military Law and the Law of War Review* 53(1): 19.
[7] Ibid.
[8] Motyl (note 5) 316.

A few days later, on 27 February 2014, the parliament in Simferopol, the administrative capital of Crimea, was occupied by heavily armed persons and the Russian flag was hoisted. Simultaneously, airports and military facilities were occupied by "Little Green Men" – a phrase used by both Russian and Ukrainian reporters which refers to both the colour of their uniforms and their unconfirmed origin. These troops forced Ukrainian military units to surrender and withdraw from the peninsula.[9] They characterised themselves as indigenous Crimean "self-defence" forces but were using vehicles with Russian military plates and wearing green Russian military uniforms without any identifying markings.[10] Russian President Vladimir Putin also denied that Russian military forces were involved. Only on 1 March did he ask the Upper House of the Russian Parliament for permission to use military forces in order to protect the Russian citizens in Crimea until the situation had stabilised.[11] However, on 16 April 2014, Putin finally admitted the involvement of Russian military forces in a television interview. Justification for the actions was, on the one hand, the adoption of legislation by the Ukrainian Parliament which rejected the use of Russian language and, on the other, the number of incidents of violence against Yanukovych's supporters.[12]

On 11 March the Crimean Parliament declared the independence of the Autonomous Republic of Crimea and on 16 March it held a referendum on the matter of its affiliation to the Russian Federation. Following the declaration of independence, Russian troops openly took part in action in Crimea, demanding the surrender of any remaining Ukrainian military units and forcing them to vacate the peninsula.[13] By a large majority, the Crimean people voted in the referendum in favour of affiliation to the Russian Federation.

After the Russian Council of the Federation had approved Crimea's request to join and recognised the Republic of Crimea as a state, on 18 March 2014 Russia and Crimea signed the Treaty on the Accession of the Republic of Crimea to the Russian Federation.

[9] Marxsen (note 3) 369.
[10] Olson (note 6) 20.
[11] ITAR-TASS Press Report: Putin's letter on use of Russian Army in Ukraine goes to Upper House, 1 March 2014.
[12] Olson (note 6) 19.
[13] Marxsen (note 3) 369.

These acts carried out by Crimea and Russia elicited an immediate response from Western states. On 12 March 2014, leaders of the G7, along with the President of the European Council and the President of the European Commission, issued a statement in which they demanded that the Russian Federation cease all efforts to change the status of Crimea contrary to Ukrainian legislation and international law.[14] On 15 March 2015 the United States attempted to sanction the Russian behaviour in the UN Security Council, but the attempt failed due to Russia's veto. Also on 18 March 2014, the President of the European Council and the President of the European Commission announced that the EU would neither recognise the referendum nor any acts that followed it. After the attempt at sanctioning Russia in the Security Council had failed, the UN General Assembly adopted a Resolution on 27 March 2014 – by a vote of 100 in favour, 11 against and 58 abstentions – declaring the referendum illegal:

> The referendum in the Autonomous Republic of Crimea and the city Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or of the city Sevastopol.[15][16]

In addition, since this time several Western states have imposed restrictive measures against Russia and Crimea, for example, asset freezes and visa bans.

C Legal Status of Crimea under International Law

The crisis in Crimea has created new challenges for international law. At this stage there is confusion over the legal status of the peninsula under international law. On the one hand, Russia considers the area as part of the Russian Federation and the citizens of Crimea have become Russian citizens with Russian passports and the Russian rouble is now the only valid currency. On the other hand, the Ukrainian government claims that Crimea was unlawfully annexed by Russia and therefore still forms part of Ukraine.

In the following section the status of Crimea under international law is examined. Part of the examination analyses the actions which took place on the road to the

[14] O Zadorozhny. 2014. Comparative Characteristics of the Crimea and Kosovo Cases: International Law Analysis. *European Political and Law Discourse* 1(3): 6.
[15] United Nations General Assembly. 27 March 2014. Territorial Integrity of Ukraine – UN Doc RES/68/262 v 27.
[16] Motyl (note 5) 317.

"annexation". The section examines the use of force in Crimea, the referendum, the declaration of independence and the Treaty on the Accession of the Republic of Crimea to the Russian Federation. Apart from analysing the different steps taken, several justifications by Russia of her actions have to be examined from the perspective of international law.

1. Legal Foundations

In order to evaluate the behaviour of Russia and actions of the Crimean population under international law, which took place after the overthrow of Yanukovych, it is important to examine the major principle and treaties of international law in this regard.

The principle that has to be mentioned is the prohibition of the use of force against another state. This principle is expressed by art 2(4) of the UN Charter (1945):

> All members shall refrain in their international relations from the threat or use of force against another the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purpose of the United Nations.

The principle was intended to outlaw war in its classic sense, that is, the use of military force to acquire territory or other benefits from another state.[17] The article is controversial – if it is to be interpreted in its widest sense – as it would then embrace all types of coercion, for example, including economic and political pressure. Despite various interpretations of these problems (which are unimportant to our present case), it has to be noted that not every military action constitutes a use of force. Actions which take place with authorisation and within the scope of this authorisation are normally excluded, because the state would have exercised its sovereignty.[18] Moreover, the use of force is not prohibited if the state has the right of self-defence. However, self-defence is legal only if the requirements of art 51 of the UN Charter are met. The UN Charter acknowledges the right of self-defence as an inherent right of states against armed attacks.[19] The UN Charter prohibition on the unilateral use of force and its exception in the case

[17] LF Damrosch, L Henkin, SD Murphy & H Smit. 2009. *International Law* (*American Casebook Series*) (5 ed). St Paul, MN: West Academic Publishers, 1147.
[18] Ibid.
[19] Ibid.

of self-defence against an armed attack are regarded as part of customary international law and have the status of *jus cogens*.[20]

In addition to the principle of prohibition on the use of force, bi-lateral agreements such as the Budapest Memorandum of 1994 are relevant. The Budapest Memorandum was concluded to provide Ukraine security assurances for acceding to the Treaty on the Non-Proliferation of Nuclear Weapons.[21] In exchange for Ukraine's giving up its nuclear arsenal, the United States, the United Kingdom and Russia committed to "respect the Independence and sovereignty and the existing borders of Ukraine" and reaffirmed

> their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine and that none of their weapons will ever be used against Ukraine except in self-defence or otherwise in accordance with the Charter of the United Nations.[22]

A second important agreement is the 1997 Treaty on Friendship, Cooperation and Partnership between Ukraine and Russia. This agreement again guaranteed the inviolability of the borders between the two states and provided that both parties

> shall build their mutual relations on the basis of the principle of mutual respect for their sovereign equality, territorial integrity, inviolability of borders, peaceful resolution of disputes, non-use of force, including economic and other means of pressure, the right of peoples to freely determine their fate, non-interference in internal affairs, observance of human rights and fundamental freedoms, cooperation among states, the conscientious performance of international obligations undertaken, and generally recognized norms of international law.[23]

In 1997, Russia and Ukraine also signed a treaty granting Russia the use of Sevastopol as a base for its Black Sea Fleet; this in return obliged Russia's forces present under the terms of the treaty to respect Ukraine's sovereignty, observe its legislation and refrain from interfering in the country's internal affairs.[24]

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[20] D Kretzmer. 2013. The Inherent Right to Self-Defence and Proportionality. *Jus ad Bellum*. *The European Journal of International Law* 24 (1): 241.
[21] Marxsen (note 3) 370.
[22] Ibid; Budapest Memorandum, signed 5 December 1994.
[23] Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, signed 31 May 1997, art 3.
[24] Olson (note 6) 26; Partition Treaty on the Status and Conditions of the Black Sea Fleet, Kiev, signed 27 May 1997. This treaty of 28 May 1997 between Russia and Ukraine established two independent national fleets and divided armaments and bases between them. Available at dtic.mil/dtic/tr/fulltext/u2/a360381.pdf (accessed 20 October 2015).

2. *The Events in Crimea from the Perspective of International Law*

Based on legal foundations, in the following we have a closer look at the actions which took place in Crimea and resulted in the inclusion of Crimea into the Russian Federation. It has to be examined if Russia's justifications are consistent with the international law and what Crimea's status under international law is, if the inclusion was unlawful.

(a) Use of Force by Russia in Crimea

Days after the overthrow of Yanukovych, "Little Green Men" arrived in Crimea and occupied the Crimean parliament and several military bases. They called themselves "self-defence groups". They did not display Russian military insignia, but were equipped with Russian military vehicles and equipment.[25] Putin denied any involvement of Russian soldiers and no definite proof was given at this point. Despite any actual operations of Russian soldiers in Crimea there is proof that these paramilitary forces were – in the beginning – primarily logistical supported and after a few days were provided with equipment and operated in a way that they are supported by strong military power.[26] No shots were fired; however, the UN Charter prohibits equally the *threat* of the use of force as well as its *actual* use. By occupying and pressuring the Ukrainian military facilities and forcing its soldiers to leave the peninsula, art 2(4) of the UN Charter could have be violated, if the actions of these groups can be attributed to Russia. In order to attribute such a group to an outside state the International Court of Justice (ICJ) applies the "effective control" test. The ICJ developed the effective control test in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* case)[27] to determine if the United States were responsible for actions of the *contras* in Nicaragua.[28] The test was questioned in case *Prosecutor v Dusko Tadic* (*Tadic* case),[29] where the International Criminal Tribunal for the Former Yugoslavia (ICTY) used the overall control test, but is since 2007 the applicable test is the "effective control" test, because the ICJ confirmed the effective control test in the *Concerning Application of the Convention on the Prevention and*

[25] Hilpold (note 4) 15.
[26] Ibid.
[27] ICJ. 27 June 1986. (*Nicaragua v United States of America*) *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits).
[28] ICJ (note 27) para 115.
[29] ITCY 15 July 1999. *Prosecutor v Dusko Tadic* IT95-1-A.

Punishment of the Crime of Genocide (*Genocide* case).[3031] At this stage, neither of these two tests can be considered as customary international law. The difference is that the overall control test was used in the *Tadic* case to determine whether an armed conflict has an international character. Because the ICJ has already decided a case with regard to state responsibility by using the "effective control" test, this test will be used to determine whether Russia can be held responsible for the action committed by the "Little Green Men". The Court determined that to attribute actions of paramilitary groups to a state, a relationship of complete dependence has to be found, which means that financing, training and support is not enough; there have to be specific instructions and planning by the state.[32] The way in which the "Little Green Men" were operating and the manner in which they were equipped presupposes that the bulk of these troops were supported by a strong military power, particularly since the coordinated actions of these forces led to the assumption that they acted under the direct control of Russia.[33] Furthermore, President Vladimir Putin admitted in an interview to an involvement of Russian soldiers, which indicates that Russia planned and directed the actions in Crimea. It can therefore be concluded that Russian soldiers acted in Crimea, Russia still violated art 2(4) of the UN Charter and therefore violated international law, as long as no justifications can be found. The intervention through the use of force also violated multilateral agreements, for example, Russia contravened the Budapest Memorandum and the Treaty of Friendship. In the following section, the justifications for the use of force are examined. Russia put forward these justifications and, if these are acceptable under international law, Putin's speech of 18 March 2014 gives the most comprehensive view of Russia's justifications. Putin does not just present legal arguments; he often makes political statements, which should indicate a legal background.

Russia justified the use of force in Crimea by citing her concern for the physical safety of Russian nationals in Ukraine. This concern was not entirely baseless, as

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30 ICJ. 26 February 2007. (*Bosnia and Herzegovina v Serbia and Montenegro*) *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, para 400.

31 Hilpold (note 4) 18.

32 ICJ (note 28) at para 115; RJ Goldstone & RJ Hamilton. 2008. *Bosnia v Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia. *Leiden Journal of International Law* 21: 98.

33 J Kranz. 2004. Imperialism, the Highest Stage of Sovreign Democracy: Some Remarks on the Annextion of Crimea by Russia. *Archiv des Völkerrechts* 52(June): 213.

over the weeks of crisis several violent incidents were directed against Russian nationals. In normal circumstances a host state is responsible for preserving public order and protecting foreign nationals from violations. However, under certain conditions some scholars and state practices accept interventions in a foreign state under international law for the purposes of rescuing nationals.[34] Even this matter, however, is controversial and there are two grounds on which the protection of nationals can be seen as a principle of international law: first, the rescue of nationals is usually undertaken for a limited period and therefore constitutes a minor infringement of art 2(4) of the UN Charter.[35] The purpose of the intervention is designed neither to destabilise the foreign government nor to undermine its sovereignty. Secondly, the protection of nationals can be seen as a part of the right of self-defence and is covered by the scope of art 51 of the UN Charter.[36] Therefore the protection of nationals can be seen as an autonomous exception to the prohibition of the use of force which is tolerated by the states.[37] But in such a case three conditions for the use of force are required: first, that nationals are victims of grave human rights violations or an imminent threat of injury is present.[38] Secondly, that local government, who are responsible for maintaining civil order and protecting minorities, have proved unable or unwilling to do so.[39] Thirdly, the measures are limited to the necessity of ensuring the safety of civilians, which means they are often short term and limited in scope. If this requirement is applied to the case of Crimea, one has to conclude that this did not apply here. No incidents were reported where Russians had to face grave physical or human rights violations. Although there was confusion in the government, the situation was far from a breakdown as the Ukrainian authorities still had the power to protect foreign nationals. Therefore the preconditions were not fulfilled and the use of force could not be justified by invoking the principle of the protection of nationals.

Furthermore, the Russian authorities pronounced the principle of invitation to intervene as a justification. During the Security Council debate about Crimea, the

[34] Motyl (note 5) 370; Olson (note 6) 35.
[35] TW Bennett & J Strug. 2013. *Introduction to International Law*. Cape Town: Juta, 342.
[36] Ibid.
[37] N Ronzitti. 1985. *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity.* Dordrecht: Martinus Nijhoff; Hilpold (note 4) fn 53.
[38] Motyl (note 5) 4.
[39] Olson (note 6) 35.

Russian representatives presented a letter addressed by the former Ukrainian president Yanukovych in which he requested Russian use of force to establish peace and order in the defence of the people of Ukraine.[40] The principle of intervention by invitation is not inconsistent with the international law. This principle allows a foreign state to deploy troops within the borders of another state;[41] however, as an exception to art 2(4) of the UN Charter, it faces limitations. In the *Nicaragua* case the ICJ concluded that the government had the right to ask for such intervention.[42] What is controversial is whether Yanukovych was still the legitimate head of government at the time of the invitation: his legitimacy is questionable because he had fled and had been removed from office by the Ukrainian parliament. But we have to consider that his removal was not in compliance with the Ukrainian Constitution; for this reason he still could be in a position to request help from Russia. In principle, the consent needs to be expressed by the state's highest authorities, which is generally the internationally recognised government.[43] Problems in this regard occur in times of civil war and revolutionary movements, because different states recognise different parties to the conflict as the legitimate government. By tradition, the criterion of effective control over at least parts of the state's territory is used to indicate the representing authorities.[44] But this criterion has been questioned in the past decade, because it displays certain weaknesses – for example: Is a brief loss of control already a loss of effective control?[45] This is why scholars argue that the question of the legitimate government should be answered through the criterion of legitimacy. State practice is inconsistent in this case.[46] In the case of Ukraine, Yanukovych lost effective control when he fled to Russia and, even if one refers to the criterion related to the legitimacy of government, no evidence exists that he had a stronger claim to legitimacy than the established interim government,[47] as he did not enjoy majority support. To expect that international order would

[40] UN DOC S/PV.7125, 3 March 2014. Available at www.securitycouncilreport.org/un-documents/document/spv7125-1.php (accessed 8 September 2015).
[41] Olson (note 6) 31.
[42] ICJ (note 28) at para 260.
[43] Marxsen (note 3) 374.
[44] G Nolte. 2010. Intervention by Invitation. In R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law Online.* Available at www.mpil.de/en/.../public-international-law/max-planck-encyclopedia.cf (accessed 14 September 2015).
[45] Marxsen (note 3) 375.
[46] Hipold (note 4) 23.
[47] Marxsen (note 3) 376.

provide for sanctions in case of such a formal constitutional violation would mean to largely overstate the possibilities of international law.[48] Consequently, the invitation from Yanukovych can be seen as invalid, which means that that the principle of intervention by invitation was no justification for the use of force by Russia.

Russia also attempted to justify its actions under the doctrine of humanitarian intervention as it claimed to have the responsibility to protect not only Russian nationals but also ethnic Russians as well as other citizens. There is no definite right in international law which recognises the responsibility to protect a person on the grounds of ethnic background.[49] It is controversial whether the doctrine of humanitarian intervention is applicable in such a situation. This doctrine, under which a humanitarian crisis of extreme gravity may provide a lawful basis for international armed intervention, has gained only limited support among states.[50] The requirements for a lawful humanitarian intervention are similar to those justifying the use of force to protect nationals. As already analysed above, the preconditions were not met for any Russian intervention. Consequently, Russia had no right to use force in Crimea.

The presence of Russian troops also violated several treaties. However, there could have been justification if the presence of Russian soldiers had been consistent with the Treaty of the Black Sea Fleet. The Russian authorities have asserted that during the whole crisis their military presence was below the agreed 25 000 troop level. But Russia did not just agree to a limitation of troops: the Status-of-Forces Agreement (SOFA) also restricted the permissible locations of Russian forces in Crimea and the equipment that they could possess.[51] In addition, the treaty required that Russia give notice and wait for approval from the Ukrainian authorities if they wished to move outside the permissible locations. The latter terms of the treaty were violated by Russia during the crisis as Russian soldiers entered government buildings and Ukrainian military facilities – the Ukrainian government having given no such approval.

[48] Hilpold (note 4) 23.
[49] Olson (note 6) 37.
[50] Ibid.
[51] Partition Treaty on the Status and Conditions of the Black Sea Fleet, Kiev, signed 27 May 1997.

Besides these justifications, Russia finally put forward the principle of *rebus sic stantibus* and state succession in order to justify its breaches of treaties.[52] Russian actions stood in contrast to the Budapest Memorandum, the Treaty of Friendship and Cooperation and SOFA. The doctrine of *rebus sic stantibus* means that legal agreements are no longer binding due to fundamental changes of circumstances.[53] This principle is codified in art 62 of the Vienna Convention on the Law of Treaties (1969). In connection with state succession, the principle of "clean state doctrine" exists, which means that a new state does not take over the positions in a contract of the former state.[54] Putin argued that such circumstances existed in Ukraine. He considered that a change of the identity of the Ukrainian state had taken place. Putin also argued that post-revolutionary Ukraine was no longer the identical subject to the pre-revolutionary one to which Russia was treaty-bound to respect borders and therefore the principle of "clean state doctrine" applied and represented a fundamental change of circumstances.

But this assumption fails in two ways: first, the requirements of state succession do not apply because revolutionary regime changes have no influence on the identity of the state.[55] Secondly, Putin misunderstands art 62 of the Vienna Convention on the Law of Treaties. Article 62 does not provide a right to terminate a treaty by appealing to the doctrine of *rebus sic stantibus*.[56] In the *Fisheries Jurisdiction* case the ICJ decided that the reference to the changing of fundamental circumstances does not entail an automatic termination of a treaty.[57] Scholars agree that the termination of a contract under international law because of the changes in fundamental circumstances is possible only if the parties have reached consensus on this kind of issue.[58]

It can be concluded that Russia used force in Crimea. No grounds for justification of this action exist under international law: Russia violated art 2(4) of the UN Charter. In attempting to justify its action, however, Russia indicated that Moscow

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[52] Motyl (note 5) 372.
[53] E Lauterpacht (ed). 2004. *International Law: Being the Collected Papers of H Lauterpacht* (*Vol 5*). *Disputes, War and Neutrality, Parts. IX–XIV*. Cambridge: Cambridge University Press, 14–15.
[54] Bennett & Strug (note 35) 260.
[55] A Zimmermann. 2006. State Succession in Treaties. In R Wolfrum (ed*) Max Planck Encyclopedia of Public International Law Online*, para 1. Available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-970199231690-e1109?prd=EPIL (accessed on 15 September 2015); Hilpold (note 4) 32.
[56] Motyl (note 5) 372.
[57] ICLJ. 2 February1973. (*Federal Republic of Germany v Iceland*) *Fisheries Jurisdiction* case.
[58] Motyl (note 5) 372.

was conscious of its behaviour in Crimea. But Russia's behaviour attacked the international legal order directly because of its use of force. In particular, the minor effort to settle the dispute peacefully has to be viewed as a failure of Russian policy and creates the impression that the action was not spontaneous.

(b) The Referendum

On 6 March 2014, the Parliament of Crimea resolved to hold a referendum on 16 March concerning the status of the peninsula and its affiliation to the Russian Federation. The referendum was held in order to obtain democratic legitimacy for incorporation into the Russian Federation. Following the referendum, the Crimean authorities announced that voter participation had been 82% and that 95% had voted in favour of the affiliation. But, even if a high percentage of the Crimean people had voted in favour, the question arises whether a referendum can trump territorial illegality and can therefore be seen as legitimising the affiliation to Russia. Although a referendum can be seen as a reliable gauge because it can be considered as an indication of public opinion, after answering this question, it still has to be examined whether international law provides requirements for holding a referendum and whether in particular circumstances these requirements are met.

In the previous century, a number of referendums were held in connection with state-building and in order to evaluate the will of the people. Such referendums occurred during the process of decolonisation and after the breakdown of the Soviet Union. Recent practice has shown that even if the majority votes in favour of independence, this does not lead to the creation of a new state.

In *Reference re Secession of Quebec* (*Quebec* case), the Canadian Supreme Court established that in a democratic state an expression of the will of people in favour of independence could not be ignored but would not lead necessarily to independence.[59] Also, state practice in this field is still inconsistent. This leads to the conclusion that referendums cannot solely be a precondition for independence; however, they can trigger negotiations – as long as the referendums are valid.[60]

Although international law was not directly violated in this case because it was a matter of internal affairs, international standards exist with regard to how a

[59] J Vidmar. 2015. The Annexation of Crimeaand the Boundaries of the Will of the People. *German Law Journal* 379; Supreme Court of Canada, 20 August 1998. *Reference re Secession of Quebec* case, paras 87 and 91.
[60] Vidmar (note 59) 379; Hilpold (note 4) 34.

referendum has to be held.[61] In addition, the possible prohibition of referendums in the Ukrainian Constitution has to be considered.

Such standards and norms are, for example, provided for in art 3 of the First Protocol to the European Convention on Human Rights (ECHR):

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of legislature.

The same is provided for in art 25 of the International Covenant on Civil and Political Rights (ICCPR). Even if the Code of Good Practice on Referendums by the Venice Commission is not binding in international law, it stipulates international law standards, which includes the freedom, secrecy, equality and universality of referendums.[62] The code also includes the precondition that "a referendum cannot be held if the Constitution or a statute in conformity with the Constitution does not provide for them …".

In particular, the principle of freedom – provided by art 25 of the ICCPR – could be violated. The freedom of a referendum requires the absence or at least the restraint of military forces of the opposing parties and the neutrality of public authorities. Such a situation did not exist during the time the referendum was held in Crimea as Russian military forces and paramilitary groups which controlled the peninsula were still in evidence. The area was a territory where recent displays of the use of force had taken place. In international law, a referendum itself becomes an instrument of abuse when it has taken place in an area with such a recent history.[63] As stated above, the Code of Good Practice on Referendums stipulates that a referendum has to be provided for by the Ukrainian Constitution. Article 73 of the Constitution sets out that a local referendum is not suitable for deciding on issues relating to altering the territory of a country.[64] Therefore the referendum is contrary to the code and, in addition, violates not only art 73 but also arts 2 and 134 of the Ukrainian Constitution. Besides the substantive requirements, procedural requirements could be violated too. In particular, the questions asked could be unclear, misleading and therefore inconsistent with international-law

[61] Marxsen (note 3) 378.
[62] Ibid.
[63] Hipold (note 4) 38.
[64] Hilpold (note 4) 37; art 73 of the Ukrainian Consitution: "Issues of altering the territory of Ukraine are resolved by an All-Ukrainian referendum."

standards on referendums. This principle includes the requirement that one question only may be asked and that this question can be answered with a "yes" or a "no".[65] The questions were:

> 1. Are you in favour of the Autonomous Republic of Crimea reuniting with Russia as a constituent part of the Russian Federation? or
>
> 2. Are you in favour of restoring the Constitution of the Republic of Crimea of 1992 and of Crimea's status as a part of Ukraine?[66]

As can been seen, either question can be answered with a "yes" or a "no". Furthermore, the second question is misleading, because in 1992 two versions of the Crimean Constitution were in force. One version explicitly stated that Crimea formed a constitutive part of Ukraine, whereas the other did not.[67] It can be added that it is also important that a certain time must elapse between the announcement of the referendum and the vote, because the inhabitants must have the chance to inform themselves about the issue and make up their mind about their vote. This was certainly not the case here when the time between the announcement and the holding of the referendum was a mere 10 days.

In conclusion, the referendum as held, is contrary to the standards and principles laid down by international law and violated the Ukrainian Constitution. In addition, it has to be stated that such a referendum cannot provide legal value in the sense that it can be seen as a legal title for territorial change. A referendum is suitable only to providing for an additional democratic legitimisation of changes in sovereign title over territory, not as a sole justification.[68] The reasons for these limitations on the legitimacy of the referendum in question are unclear preconditions and inconclusive state practice.

(c) Incorporation of Crimea into the Russian Federation

The day following the referendum, the Supreme National Council of Crimea declared Crimea's independence and, on 16 March 2014, representatives signed a treaty with Russia. The treaty provided for the affiliation of Crimea to the Russian

[65] Marxsen (note 3) 379.
[66] Translation is available at http://www.reuters.com/article/us-ukraine-crisis-referendum-idUSBREA2A1GR20140311 (accessed on 20 September 2015).
[67] Marxsen (note 3) 379.
[68] Hipold (note 4) 34.

Federation. But the question is this: Did Crimea have the right to declare its independence under international law and, subsequently, could it be validly integrated through a treaty with the Russian Federation?

In order to investigate the question of the validity of the declaration of independence, one must examine the right of external self-determination and the Advisory Opinion of the ICJ on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (*Kosovo* case).[69]

Both the Crimean and the Russian authorities refer to the right of self-determination of peoples as a foundation of the declaration of independence and state secession from Ukraine. Representatives of Russia declared in the Security Council that:

> through a free referendum, the people of Crimea have fulfilled what is enshrined in the Charter of the United Nations and a great number of fundamental international legal documents – their right to self-determination.[70]

The right of self-determination developed during the 20th century. It is incorporated in art 1(2) of the UN Charter and proclaimed in the Friendly Relations Declaration, as follows:

> all people have the right to freely determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.[71]

But it has to be noted that claims for independence frequently cause a clash between the right of self-determination and the principle of the territorial integrity of states.[72] It is commonly understood that concepts of self-determination may not be used to disaggregate the territory of existing nation-states.[73] In the Advisory

[69] ICJ. 22 July 2010. Advisory Opinion: *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo.*
[70] S/PV.7144 du 19 March 2014, 8. Available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7144.pdf (accessed on 8 September 2015); T Christakis. 2014. Self-determination, Territorial Integrity and *Fait Accompli* in the Case of Crimea. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 74: 80.
[71] United Nations General Assembly. 24 October 1970. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, A/RES/25/2625.
[72] Vidmar (note 58) 367.
[73] Marxsen (note 3) 381.

Opinion on the *Kosovo* case, the ICJ acknowledged the right to self-determination, but also determined that the question whether there is a right for part of the population to separate from an existing state does not have to be answered here, because the UN General Assembly only asked whether the declaration of independence was in accordance with international law.[74] The principle of self-determination is also expressed in the Friendly Relations Declaration:

> The principle of self-determination may not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states as long as states respect the principle of equal rights and self-determination in relation to minority groups.[75]

By now it is customary international law, backed by art 2(4) of the UN Charter, that the principle of territorial integrity overrides the principle of self-determination.[76] International scholars argue that the right to self-determination has priority only in cases of decolonisation and internal oppression of minority groups, known as the issue of "remedial secession". Remedial secession theory is a doctrine by which an infra-state community that is a victim of oppression and massive violations of human rights by the encompassing state and that is unable to exercise its right to internal self-determination can – in certain circumstances – resort to secession by way of *ultimum remedium*.[77]

Regarding the issue of internal oppression and remedial succession, the Supreme Court of Canada argued in the *Quebec* case[78] that the right to independence perhaps arises only where secession would be the last resort for ending oppression, or where there is no meaningful arrangement in place for internal self-determination.[79] At present it is not evident, however, that there is such provision in customary international law which would be applicable to Crimea.[80] There is insufficient *opinio juris* and state practice. Cases such as Bangladesh in 1974 and

[74] UN General Assembly (note 71) at paras 82 and 83.
[75] UN General Assembly (note 71).
[76] N Paech. 2014. *Wem gehört die Krim? Die Krimkriise und das Völkerrecht* 3. Available at http://norman-paech.de/v%C3%B6lkerrecht/ (accessed 1 September 2015).
[77] Christakis (note 70) 10.
[78] Supreme Court of Canada. 20 August 1998. *Reference re Secession of Quebec.*
[79] Vidmar (note 59) 222, 370.
[80] Christakis (note 70) 11.

Kosovo in 2008 are problematic in this respect, because one was achieved with the consent of Pakistan and the other after nine years of oppression.[81] Even if such a right is accepted as customary international law, a situation such as that in Bangladesh did not occur in Crimea. Secession is an *ultima ratio* measure and therefore requires that no prospect exists of realising the inhabitants of Crimea's right to self-determination within the existing political system of Ukraine.[82] On the contrary, the Ukrainian political system certainly acknowledged the special status of Crimea. The peninsula also had the status of an autonomous republic so that the institutional arrangements for implementing internal self-determination were in place.[83]

Even before declaring actual independence, the Supreme Council of Crimea announced that they simply did not have the right to declare independence in terms of the right of self-determination and the legitimising referendum, but also from the ICJ Advisory Opinion in the *Kosovo* case. The latter is referred to as an authority that such declarations do not violate international law.[84] Whether one can apply the rules of the *Kosovo* case to the Crimea case has to be examined in the following manner. It has to be mentioned that the judgment on the Advisory Opinion in the *Kosovo* case appears to be inconsistent, given the official position of Russia on Kosovo's declaration of independence and non-recognition of the state by Russia.[85]

The UN General Assembly asked the ICJ to render an Advisory Opinion on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

On 22 July 2010 the Court delivered its Advisory Opinion and declared that:

> the adoption of the declaration of independence of 17 February 2008 did not violate general international law because international law contains no prohibition on declaration of independence.[86]

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[81] Vidmar (note 58) 370.
[82] Marxsen (note 3) 383.
[83] Ibid.
[84] Marxsen (note 3) 380; Quoted after RT-Press Report, Crimea Parliament Declares Independence Ahead of Referendum, 11 March 2014.
[85] Zadorozhny (note 14) 8.
[86] ICJ Advisory Opinion on the *Kosovo* case para 81.

The ICJ acknowledged that there is a relevant international practice in which states and the Security Council have declared such unilateral declarations of independence as invalid.[87] The ICJ argues in these cases that the invalidity does not follow from the unilateral character as such, but from their close link to serious violations of international law:

> the illegality attached to the declaration of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norm of general international law, in particular those of peremptory character (*ius cogens*).[88]

Up to the present time, it is unclear exactly what the current criteria are for the determination of such a link. But, on the other hand, it is clear that just because a territory has at some point in the past been the victim of an unlawful use of force, this does not automatically bar all future attempts at altering its territorial status. Even if certain criteria are controversial, in the Crimean case there is evidence to support the nexus between the declaration of independence and the unlawful use of force. In the context of the ICJ ruling, Crimea's declaration of independence may be seen to be invalid. Not applying the *Kosovo* case to Crimea is in line with the opinion of the United States and European states, who consider the situation of Kosovo unique and argue or suggest that the recognition of its independence should not become a precedent for other breakaway entities to follow.[89] This uniqueness arises from the general context of the disintegration of the former Yugoslavia and its long period under UN administration.[90] In this regard, it can be stated that Crimea had no right to self-determination and no backup from the ICJ and therefore the declaration of independence was invalid.

Nevertheless, Crimea signed a treaty with Russia concerning integration with the Russian Federation. Article 1 of that treaty provided that the "Republic of Crimea is considered to be adopted in the Russian Federation from the date of signing this agreement". The incorporation was, it stated, " based on the free and voluntary will of the people of Crimea".

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[87] Marxsen (note 3) 380; UN Security Council S/RES/217 (1965) of 20 November 1965, para 3 (*Southern Rhodesia*); S/RES/787 (1992) of 16 November 1992, para 3 (*Bosnia and Herzegovina*).
[88] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, ICJ Reports 2010, para 81.
[89] Zadorozhny (note 14) 9.
[90] Ibid.

There are, however, other reasons why the treaty could be invalid. The agreement between Crimea and Russia must be a treaty under international law, because it concerns the adoption of one state by another state. Under international law a treaty is ordinarily understood as an agreement between states.[91] Therefore the question is: Was Crimea actually a state at the time it signed the treaty? There is no universal definition of statehood; however, international law considers art 1 of the Montevideo Convention on Right and Duties of States (1934) as a legal framework of statehood:

> The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) defined territory; (c) a government; and (d) capacity to enter into relations with other states.

Even if we accept that Crimea is a territory which does not have to be definitely defined, the problem is whether Crimea has a functional government or the capacity to enter into international relations. Such an ability is in doubt, because Crimea – as a supposedly independent entity – would not have existed but for Russian military intervention. Control of Crimean territory appears to be more under the command of the Russian president than the Crimean authorities.[92] From this point of view, it can be said that Crimea did not constitute a state capable of entering into a treaty with the Russian Federation.

A second question, which concerns the validity of the treaty/agreement, is that it appears to be directly contrary to the peremptory norm of state territorial integrity.[93] It is the final act in a process of annexing sovereign territory and may be regarded as no less integral to accomplishing that goal than the use of force itself.[94] The treaty would therefore finalise the fruits of an unlawful use of force.

It can be concluded, therefore, that the agreement is invalid under international law and therefore that Crimea was not legally affiliated by the Russian Federation.

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[91] Benett & Strug (note 34) 40.
[92] C Borge. 2014. *From Intervention to Recognition: Russia, Crimea, and Arguments over Recognizing Secessionist Entities.* Available at www.http://opiniojuris.org/2014/03/18/intervention-recognition-russia-crimea-arguments-recognizing-secessionist-entities/ (accessed 11 November 2015).
[93] GH Fox. 2015. The Russia–Crimea Treaty. *Opinio Juris*. Available at http://opinionjuris.org/2014/03/20/guest-post-russia-crimea-treaty/ (accessed 11 November 2015).
[94] Ibid.

(d) Interim Conclusion

As has been demonstrated, the actions which took place in Crimea at the beginning of 2014 were contrary to international law. Russia used force unlawfully and the Autonomous Republic of Crimea could not declare its independence and, consequently, could not sign the Treaty of Inclusion with the Russian Federation. Coming to this conclusion underlines the importance of art 2(4) of the UN Charter and art 52 of the Vienna Convention on the Law of Treaties. The picture is established that there is no right of secession in favour of Crimea. From this perspective, what the current status of Crimea under international law is has to be discussed.

3. *Result*

Depending on one's perspective, Crimea's status can differ from being a part of Russia to being a part of Ukraine or to being an occupied territory. The unlawful use of force is inseparably connected to the purported subsequent alteration of the status of Crimea. Furthermore, the problem of *de jure* and *de facto* authorities arises, which influences the subsequent decision on the status of Crimea under international law.

Crimea has not become an independent state at any point: it could not secede from Ukraine since the requirements for the right to secession had not been fulfilled.[95] Owing to the invalid declaration of independence, Crimea and the Russian Federation could not lawfully agree by treaty that Crimea had or would become part of the Russian Federation. Therefore, from an international-law perspective, Crimea is still part of Ukraine.[96]

D. The *De Jure–De Facto* Dichotomy

De jure Crimea is still part of Ukraine, but *de facto* a different situation exists. There is a large presence of Russian State organs, including armed forces, in Crimea and Russia has already introduced Russian law to the area. Article 42 of

[95] Marxsen (note 3) 384.
[96] Ibid; Geiss (note 1) at 443; M Bothe. 2014. The Current Status of Crimea: Russian Territory, Occupied Territory or What? *The Military Law and the Law of War Review* 53(1): 101.

the Hague Convention No IV Respecting the Laws and Customs of War and Land (1907) (HR) provides that a "territory is considered occupied when it is actually placed under the authority of the hostile army".[97]

Since the Russian Federation considers Crimea as part of its own territory, it is exercising direct and effective control over the territory and therefore Crimea must be seen as a territory occupied by Russia.[98] There are various forms of occupation, including "belligerent" and "pacific". The occupation of Crimea could be seen as belligerent. A belligerent occupation is a foreign military presence brought about without the consent of the state to which the occupied territory belongs.[99] The Russian forces are present without the consent of Ukraine and therefore it can be stated that a situation of a belligerent occupation exists in Crimea.

Circumstances can vary from one territory to another. In *Prosecutor v Mladen Naletilic and Vinko Martinovic* (*Natelilic* case), the ICTY advanced the view that the occupying power "must have a sufficient force present or the capacity to send troops within a reasonable time to make the authority of the occupying power felt".[100] In the case of Crimea, Russia has deployed thousands of military forces throughout the entire peninsula and they have the capacity to deploy more at any time. Because of this fact and the refusal of the presence by the Ukraine authorities, it can be stated that a situation of a belligerent occupation exists in Crimea.

Coming to this conclusion also underlines the importance of art 2(4) of the UN Charter and art 52 of the Vienna Convention on the Law of Treaties. It is beyond doubt that forcible acquisition of territory – whether treaty-based or not – is illegal and without effect under international law.[101]

Clearly, the mere passage of time cannot "heal" the unlawfulness of an alteration of the status of a territory effected by force. On the other hand, it is clear that just because a territory has at some point in the past been a victim of an unlawful use of force, this does not automatically bar all future attempts at altering territorial

[97] Convention No IV Respecting the Laws and Customs of War and Land, 18 October 1907.
[98] Geiss (note 1) 443; Bothe (note 96) 101.
[99] Bothe (note 96) 102.
[100] ICTY. 31 March 2003. (*Prosecutor v Mladen Naletilić and Vinko Martinović*) *Naletilic* case, para 217.
[101] Geiss (note 1) 433.

status. Therefore, hypothetically, if Ukraine at some point in the future freely decided to cede the territory of Crimea to the Russian Federation, a valid territorial status alteration could be effected.

It has to be stated that viewed from the perspective of international law Crimea is still part of Ukraine, but *de facto* it is occupied by Russia. As it is an occupied territory, the HR and the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1947) (GC IV) are applicable, even if Russia as an occupying state denies this and is welcomed in the area. To find an appropriate solution to this situation, it is necessary to highlight some crucial elements of the law of occupation and to compare them to the legal situation which would exist if the territorial alterations were lawful and valid.

In the current Crimean case, the problem is that the occupying state denies the status of occupation or that it is an occupying power. The purpose of further examination is therefore to compare the situation of an invalid and a valid acquisition of Crimea with a focus on the rights of the inhabitants in each situation. Through the comparison one can examine which legal system holds the better legal solution for such a situation, and what the law of occupation has to reclaim for the good of the inhabitants of Crimea. The hypocritical assumption of a change in the applicable law could be built on the argument that the law of occupation no longer provides an appropriate legal system. This is because it can no longer provide for the protection of civilians, which would be provided for, in comparison, in the case of a valid acquisition. Furthermore, the recent state practice in other occupations could substantiate such an argument. In what follows, elementary facts of the law of occupation and the law of state succession are first highlighted in the case of the situation which would exist if the attachment of Crimea had been valid. In each section, the rights of the population are specifically examined. Secondly, a comparison has to take place which may solve the issue raised.

1. *Principles of the Law of Occupation*

Crimea is an occupied territory. The territory is controlled by Russian authorities but *de jure* is still part of Ukraine. The occupation of Crimea by Russia is not the only belligerent occupation to have occurred since World War II. Prior to the

occupation of Crimea, there have been occasions when other states have occupied foreign territory: for example, Israel occupied the West Bank in 1967. Likewise, the Coalition occupied Iraq in 2005. International law therefore developed the law of occupation prior to and following World War II in order to deal with these situations. International law had already acknowledged the law of occupation during the 19th century.[102] It was framed by European governments during conferences in Brussels (1874) and The Hague (1899).[103] The result was Hague Regulations of 1899,[104] the purpose of which was to set rules concerning the protection of civilians under occupation and protect the interests of the ousted government.[105]

The law of occupation is part of international humanitarian law (IHL) and was developed through the concepts of sovereignty and statehood. The aim of the doctrine of occupation is to solve the problem which arises when a foreign state exercises power in the territory of another sovereign state.[106] It can be defined as the effective control of a power over a territory to which this power has no sovereign title, without the consequence that the ousted government loses its sovereignty over that territory.[107] Because no transfer of sovereignty takes place, the main challenge the law faces is to clarify the interrelationship between the occupying power, the ousted government and the inhabitants for the duration of the occupation.[108]

The rules of the law of occupation emerged from a conviction in Europe that sovereignty may not be alienated though the use of force.[109] The main rules and regulations are provided in the Regulations annexed to HR and GC IV. These lay down the basic legal framework within which an occupying power must operate. The HR focuses on resolving a conflict between the interests of the occupying power, the ousted government and the inhabitants of the occupied territory. By way of contrast, the effect of the GC IV is to ensure the interests of the

[102] E Benvenisti. 2004. *The International Law of Occupation* (2 ed). Oxford: Oxford University Pres, 1.
[103] Benvenisti (note 102) 20.
[104] Convention (II) with Respect to the Laws and Customs of War on Land and 1st Annex: Regulations concerning the Laws and Customs of War on Land, The Hague 29 July 1899.
[105] Benvenisti (note 102) 20.
[106] Benvenisti.(note 102) 1.
[107] Benvenisti (note 102) 3.
[108] Benvenisti (note 102) 6.
[109] Benvenisti (note 102) 1.

inhabitants. The principles set out in the HR and GC IV apply to any belligerent occupation, irrespective of the lawfulness of the use of force.[110] It has to be seen in connection with the main principle of IHL that the law applies equally to both sides of the conflict. The law of occupation is not concerned with the status of the territory prior to its occupation, so that its application by an occupant is without prejudice to any underlying dispute concerning the territory.[111] The law of occupation promises reciprocal guarantees of political continuity and attempts to keep this promise by promoting certain principles. The basis of and fundamental background to these principles is art 43 HR:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

It is seen as a mini-constitution for the occupation administration.[112]

The inherent principle of art 43 HR is that the military occupation of territory during war does not confer sovereignty upon the occupying power.[113] The displaced sovereign power loses possession of the occupied territory *de fa*cto but retains title *de jure*.[114] The occupant is expected to fill the temporary vacuum created by the ousting of the local government and maintain its bases of power until the conditions for the latter's return are mutually agreed upon.[115] The status is merely temporary, which has several consequences. In this connection it can be stated that a purported annexation by the occupant power has no effect upon the rights conferred by Convention on the inhabitants of the territory.[116] This is underlined by art 47 GC IV and art 4 of the Additional Protocol I of the GC IV:

> The application of the Conventions and of this Protocol, as well as the conclusion of agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the

[110] C Greenwood. 2006. 'The Administration of Occupied Territory in International Law.' *Essays on War in International Law*, London: Cameron May Ltd, 355.
[111] Greenwood (note 110) 356.
[112] Benvenisti (note 102) 69.
[113] Greenwood (note 110) 357.
[114] Y Dinstein. 2009. *The International Law of Belligerant Occupation.* Cambridge: Cambridge University Press, 49.
[115] Benvenisti (note 102) 69.
[116] Greenwood (note 110) 357, 358.

> Convention and this Protocol shall affect the legal status of the territory in question.

In similar vein, the ICJ – in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[117] – concluded that events unfolding in the territories under Israeli occupation have done nothing to alter Israel's status as an occupying power.[118]

A second principle inherent in art 43 HR is the obligation to fulfil governmental functions in the territory. The purpose is to protect the civilian population in an occupied territory from a significant decline in ordinary life.[119] This obligation must be read as an empowerment to do what is necessary to carry out the allotted tasks of maintaining law and order.[120] This is underpinned by art 25(4) GC IV:

> However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

The choice of the necessary means is left to the occupying authorities as long as they "ensure" public order and safety. The occupying authorities are thereby permitted to foster the economic and social dimensions in the occupied territory.[121] The duty continues even in the event of hostilities in the occupied territory. In *Physicians for Human Rights et al v IDF Commander of Gaza* (*Rafia* case), the Israeli Supreme Court propounded the view that the occupying power must refrain from actions that harm innocent civilians and must ensure supplies of food and medication to the civilian population.[122]

Thirdly, art 43 HR includes the principle that the occupying power must respect the laws in already force. "Respect" means that the occupying authority has to maintain the laws in force and not modify, suspend or replace them with its own legislation.[123] Changes in the law of the territory will be contrary to international law unless they are required for the legitimate needs of the occupation. Concerns could be raised that the wholesale duplication of legislation in the occupied area

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[117] ICJ. 10 July 2004. Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.
[118] Paragraph 78; Dinstein (note 114) 50.
[119] Dinstein (note 114) 92.
[120] Dinstein (note 114) 93.
[121] Benvenisti (note 102) 79; Dinstein (note 114) 94.
[122] High Court of Justice. 30 May 2004. 4764/04, *Physicians for Human Rights et al v IDF Commander of Gaza* 58 (5) PD-4764/04, 394–395; in accordance with art 55 and 56 of GC IV; Dinstein (note 114) 101.
[123] Dinstein (note 114) 108.

and the assimilation of the legal landscape of the two regions would effectively amount to be a *de facto* annexation of the occupied territory.[124] In order to counter these concerns, art 64 GC IV can be put forward. This article is seen as amplification and clarification of art 43 HR.[125] According to art 64 GC IV, exceptions can be made and the occupying power can legislate if changes are necessary for the security of the armed forces. Those needs can vary and can be seen differently by each occupant. Furthermore, the occupying power is allowed to legislate in order to implement the regulations of the GC IV. As a signatory party, the occupying power cannot leave domestic legislation in place that clashes with the GC IV.

Finally, the occupying power can legislate on issues related to the needs of the civilian population. In addition, the question has to be resolved whether the occupying power is – in the name of necessity – allowed to make institutional changes. In this regard, art 47 GC IV has to be cited in full:

> Protected persons who are in occupied territory shall not deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, nor by any agreement concluded between the authorities of the occupied territory and the occupying power, nor by any annexation by the latter of the whole part or part of the occupied territory.

The tenor of the article is that the occupying authority should not be allowed to circumvent their protection obligations to and benefits for the civilian population through the introduction of institutional changes.[126] In a similar manner, the European Court of Human Rights (ECHR) ruled in *Loizudou v Turkey* (*Loizidou* case) that:

> the obligation to secure human rights in an area under effective control outside the national territory, derives from the fact of such control whether it be exercised directly, though its armed forces, or through a subordinate local administration.[127]

Changing the configuration of political institutions is an activity that exceeds the military government's powers.[128] Lastly, it should be mentioned that changes in the law by the displaced powers are not applicable in the occupied territory.[129]

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[124] Benvenisti (note 102) 93.
[125] Dinstein (note 114) 110.
[126] Dinstein (note 114) 123.
[127] European Court of Human Rights. 18 December 1996. *Loizudou v Turkey*, para 52.

2. Citizenship and Rights of the Population under the Law of Occupation

After introducing the basic principles and rules of the law of occupation, in the following section the rights of the populations protected under the law of occupation, including the question of nationality and human rights, are examined further.

Originally, the population of an occupied territory had no rights. A new development started with the codification of the Hague Regulations (HR) in 1899 and 1907. The Military Tribunal of Nuremberg (1945-1946) stated that the Regulations were seen as customary law during World War II.[130] One of the legal consequences of World War II concerning the protection of civilians is to be found in the Fourth GC IV of 1949. The most relevant articles with regard to the protection and rights of civilians in the time of occupation can be found in arts 42–56 HR, 27–34 GC IV and 47–48 GC IV.

But before one can take a closer look at the actual rights of the population, it is important to note that the HR and GC IV differ in their application of *ratio personae*. The HR does not distinguish between different categories of civilian: the persons who should be protected are "inhabitants of the occupied territory" or the "population" in general.[131] In comparison to the HR, the GC IV applies to "protected persons". Article 4 GC IV defines "protected persons" as:

> those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in hands of a Party to the conflict or Occupying Power of which they are not nationals.

A special problem in the Crimean situation is the fact that Russia has begun a nationalisation programme which includes granting Russian nationality to the inhabitants of Crimea. The granting of nationality is within the jurisdiction of every state, that is, every state is free to choose to whom they wish to grant nationality.[132] This means that those inhabitants of Crimea carrying Russian

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[128] Dinstein (note 114) 124.
[129] Greenwood (note 110) 361.
[130] H-P Gasser. 1995. Protection of the Civilian Population. In D Fleck (ed) *Handbook of Humanitarian Law in Armed Conflict*. Oxford: Oxford University Press, 241.
[131] See arts 44–46 and arts 50, 52 and 56 HR.
[132] K Ipsen. 1999. *Völkerrecht* (4 ed). Munich: CH Beck Verlag, 293.

passports are no longer "protected persons" under the GC IV and therefore cannot claim any rights protected by it. However, the granting of nationality also faces limitations from an international-law perspective. One of these limitations says the granting of nationality is accepted if there is an actual close relationship between the granting state and the concerned person.[133] Such a relationship must be detectable by objective criteria, for example, by residence or family relationships.[134] It is questionable whether such a relationship exists in the case of Crimea, because not every inhabitant in the peninsula fulfils these requirements. In addition, art 47 GC IV has to be mentioned:

> Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory …

The main purpose of the GC IV – in particular art 47 – is that changes which are introduced by the occupying power must not lead to protected persons' being deprived of the rights and safeguards provided for them.[135] Therefore a collective grant of nationality would not affect the situation of any inhabitants of Crimea as protected persons.[136] Further arguments can be seen in the following when it comes to the influence of the law of occupation on the nationality of the inhabitants of an occupied territory.

The first right that has to be mentioned is the right that civilians are entitled to respect for their person, honour, family rights, and religious conviction and practice. This right is provided by art 46 HR: family honour and rights, the life of persons, and private property as well as religious convictions and practice must be respected.

This protection of inhabitants is also laid down in art 27 GC IV. This rule has a human rights content and therefore must be interpreted in the light of provisions for the protection of human rights.[137] The general rule of human treatment has the purpose of guaranteeing the enjoyment of human rights to which all human beings are entitled and these rights have to be respected by the occupying power at all

[133] Ibid.
[134] Ibid.
[135] J Picet (ed). 1958. *Commentary Geneva Convention IV.*. Geneva: International Committee of the Red Cross, 274.
[136] Bothe (note 96) 104.
[137] Grasser (note 130) 247.

times. Exceptions are permitted only in special situations of occupation. The right to physical integrity involves the prohibition of acts impairing individual life or health.[138] The obligation to respect family rights is intended to safeguard the marriage ties and the community of parents and children constituting a family.[139] In times of religious war and religious opposites it is important to note that the inhabitants have the right to their religious convictions being respected by the occupying power. This right implies having the freedom to believe or not to believe and change from one religion to another.[140] The inhabitants must also have the freedom to practise their religion unhindered, without any restriction. Besides respecting the individual rights of the civilian population, art 46 HR and art 27. GC IV provide that the occupying power must also respect and leave unchanged the social context in which the inhabitants of the occupied territories live.[141]

In order to strengthen the principle introduced by art 27 GC IV, the International Red Cross Conference adopted art 32 GC IV:

> The High Contracting Parties specially agree that each of them is prohibited from taking any measures of such character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical of scientific experiments not necessitated by medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.

The purpose of the article is to ensure that every person shall receive humane treatment. In this context it is important to state that the prohibition is absolute. The prohibition covers all forms of torture, whether they form part of penal procedure or are quasi- or extra-judicial acts and whatever the means employed.[142] It is not necessary that the acts cause a bodily injury. Torture in occupied territory is prohibited even if the penal legislation of the occupying territory provides for it.[143] The occupying power has to repeal the law in such cases, according to art 64 GC IV. The acts listed in art 32 GC IV are not final, which means that other treatments that are not listed can be added. The argument for such a view is that

[138] Picet (note 135) 201.
[139] Picet (note 135) 202.
[140] Picet (note 135) 203.
[141] Grasser (note 130) 247.
[142] Picet (note 135) 223.
[143] Ibid.

the wording of the article has a general character and therefore is open to further interpretation.

The inhabitants of an occupied territory also have the right to their survival being ensured. This right is provided for by art 54(1) Protocol I of GC IV, which prohibits "starvation as a method of warfare". According to art 54(2) Protocol I of GC IV, it is forbidden to destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, livestock, drinking water, in order to starve the civilians, to cause them to move away or for any other motive.[144] This right is additionally supported by art 55 GC IV.

The inhabitants furthermore have the right to remain in the occupied territory. Article 49 GC IV provides that:

> Individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Unlawful deportations or transfers constitute a grave breach of the Convention in accordance with art 147 GC IV and they are considered a war crime according to the Rome Statute of the International Criminal Court. The ICTY distinguished deportation and transfer in the way that

> deportation requires the displacement of persons across a national border … and forcible transfer which may take place within national boundaries.[145]

This right is of great importance to the Crimean Tartars because while the Soviet Union existed they were deported from Crimea.

When it comes to the rights and protection of citizens, another important factor is the question of what happens to the citizenship of the inhabitants of the occupied territory, especially when the occupying power considers the territory to be a part of its own territory. One of the main principles of the law of occupation is that the occupation is just a temporary situation and that the displaced government remains *de jure* the sovereign of the territory. This leads to the conclusion that the inhabitants remain nationals of the sovereign state and do not become nationals of the occupying power, merely because of the *de facto* situation of occupation. On the other hand, it is a principle that a sovereign state can decide by itself to whom

[144] Dinstein (note 114) 148.
[145] ICTY. 15 March 2002. *Prosecutor v Milorad Krnojelac* IT-97-25-T, para 474.

it grants nationality.[146] These freedoms can be limited by human rights considerations and the rights of other states. According to art 4 of the Russian law of 23 March 2014, "On the Acceptance of the Republic of Crimea into the Russian Federation and the Creation of New Federal Subjects – the Republic of Crimea and the City of Federal Significance Sevastopol", citizens of Ukraine and stateless persons who were permanently residing in Crimea as of 18 March are recognised as citizens of Russia, unless they declare within one month their desire to maintain another citizenship or to remain stateless. The question is how to handle such actions under international law. It can be stated that this action could cause a conflict with Ukrainian municipal law, because Ukraine has a long-standing policy of non-recognition of multiple citizenship. However, Ukrainian officials have stated that Ukraine will continue considering Crimean residents, including those who apply for and are issued with Russian passports, as citizens of Ukraine and will guarantee them political and economic rights. Acknowledging that this "to a certain extent" goes against Ukrainian legislation, a Ukrainian Cabinet of Ministers official explained that the case of illegal annexation of Ukrainian territory and "forceful issuance" of passports by Russia are circumstances that warrant an exception.[147]

From an international-law perspective, the principle of the law of occupation and Court decisions must examined. Some arguments have already been presented in the context of the question whether Crimeans are still "protected persons" under art 4 GC IV. In addition, another principle – which is inherent in art 43 HR – that requires mentioning is that the political institutions and public life in general should be allowed to continue with as little disturbance as possible.[148] Not only legal institutions of the state but also the social structure of the population of an occupied territory shall be left unchanged.[149] As a consequence, from these principles one can conclude that the granting of citizenship by the occupying power to the inhabitants of the occupied territory is a breach of international law. This view is underpinned by the decision of the ECHR in *Al-Jedda v United*

[146] I Bownlie. 2003. *Principles of Public International Law.* Oxford: Oxford University Press, 373.
[147] Available at http://eudo-citizenship.eu/news/citizenship-news/1113-the-aftermath-of-annexation-russia-and-ukraine-adopt-conflicting-rules-for-changing-citizenship-of-crimean-residents.
[148] Grasser (note 130) 246.
[149] Ibid.

Kingdom (*Al-Jedda* case).[150] The court stated that international law prevents an occupying power from making fundamental changes to the law of nationality in the occupied territory.[151] From this point of view, it can be concluded that granting Russian citizenship to the Crimean people violates the law of occupation. This result is in line with the view presented above that the inhabitants do not lose their status as "protected persons" under art 4 GC IV.

Lastly, one of the most important issues has to be examined: How can the inhabitants can invoke their human rights in a situation of occupation? The human rights system developed after World War II and became codified in the Universal Declaration of Human Rights. Departures from that are several principal human rights treaties, for example, the ICCPR or the ECHR in connection with the law of occupation. The question then arises how these two legal systems interact. Some scholars see them as not applicable in the same situation. Human rights law and IHL are seen as two distinct disciplines of international law. Because human rights law was designed for times of peace, it is argued that human rights law is inapplicable in times of war. Furthermore, scholars argue that this cannot result in a derogation of the right of life.[152] On the one hand, art 4(2) ICCPR states that the right to life is not disposable, but, on the other hand, the authors did not intend to prohibit killing in times of war.[153] It is argued that they simply thought the Covenant was not applicable.[154] In the past decade, the question has also been put before the ICJ. In the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (*Nuclear weapons* case) the Court confirmed for the first time that the rights contained in the ICCPR apply during times of war, but contravention of those rights "can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself".[155]

A further development appeared in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian*

[150] European Court of Human Rights. 7 July 2011. *Al-Jedda v United Kingdom* 27/21/08.
[151] S Mantu. 2014. *Contigent Citizenship.* Leiden: Brill Academic Publisher, 213; *Al Jedda* case, para 54.
[152] C Tomuschat. 2010. Human Rights and International Humanitarian Law. *The European Journal of International Law* 16.
[153] Ibid.
[154] Ibid.
[155] ICJ. 8 July 1996. Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, para 240.

Territory[156] and in the judgment in *Concerning Armed Activities on the Territory of the Congo* (*Congo* case).[157] The ICJ is of the view that human rights law applies in occupied territory:

> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[158]

Furthermore, art 72 of the Additional Protocol I of GV IV sets out the range of applicable human rights independently:

> The provisions of this section are additional to the rules concerning humanitarian protection of civilians and civilian object in the power of the Party to the conflict contained in the Fourth Geneva Convention, … as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.

In accordance with the article, the rules are deemed to be complementary to IHL and therefore the law of occupation.[159] It has to be kept in mind that states have to be contracting parties, because otherwise the rules apply only to the extent that they are part of customary law. The inhabitants of occupied territories are in principle entitled to benefit from the customary corpus of human rights that coexists with the law of occupation.[160] However, in times of war some human rights are derogable and others are non-derogable. Non-derogable rights are the right to life freedom from torture and slavery. Because of the distinction between derogable and non-derogable rights in human rights law, it is important how the law of occupation and the human rights law interact. For the most part, enough room exists for a symbiotic relationship between the two legal systems. The problem is that the derogable human rights may be suspended in wartime, so inhabitants are dependent on the rights which apply during belligerent occupation. Some of these are similar to the human rights system, for example, art 32 GC IV, which states:

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[156] ICJ. 9 July 2004.
[157] ICJ. 19 December 2005. *Concerning Armed Activities on the Territory of the Congo*.
[158] Paragraph 106.
[159] Dinstein (note 114) 70.
[160] Dinstein (note 114) 71.

> The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment …, but also to any other measure of brutality whether applied by civilian or military agent.

In the other side human rights law can fill the gap when the law of occupation is silent or incomplete? Furthermore, the GC IV may not apply to every inhabitant in the occupied territory. That is why it fills a further gap of protection and provides a comprehensive protection of human rights in the territory.[161] In this context it is important to note one important case, where a court examined human rights violations in occupied territory – the *Loizidou* case decided by the ECHR. In this case the violation of property rights was attributed to Turkey, which invaded North Cyprus unlawfully and had *de facto* control over the area. Because of this *de facto* control, the Court constituted jurisdiction within the meaning of art 1 of the Convention.[162]

In occupied territory inhabitants have the opportunity to appeal to the International Committee of the Red Cross (ICRC).[163] It is important to note that even if the Russian Federation were to reject an initiative of the ICRC to protect the inhabitants of Crimea, the Court has the opportunity to use its right of initiative to visit and care for political detainees.[164] This right is therefore of great importance in cases where a person is detained in a territory the status of which is controversial and where there is a divergence of views whether the law of armed conflict applies or not.[165]

As has been seen, a close relationship between the law of occupation and human rights law exists. Both legal systems support and assist one another, which consequently provides a high level of protection.

[161] Dinstein (note 114) 84–85.
[162] Bothe (note 96) 105.
[163] Bothe (note 96) 107.
[164] Ibid.
[165] Bothe (note 96) 108.

After having a closer look at the law of occupation and the rights of the inhabitants of the occupied territory, it is important for the purposes of comparison to examine the situation of a valid Crimean succession to Russia.

3. Principles of the Law of State Succession

In the following section, the focus is on the principles of the law of state succession. Such a situation would arise if someone considers the admission of Crimea into the Russian Federation valid. First, it is important to examine the main principles of state succession. Following that, I examine how the rights of the inhabitants would change in such a situation.

The landscape of a state is not fixed for all time. All over the world, new states have arisen or ceased to exist during the past centuries. Political entities are therefore not immutable. As a basic definition, it can be said that the problem of state succession arises whenever a change of sovereignty over territory occurs.[166] Whatever form a change of sovereignty may take, it always involves a disruption of legal continuity and rules of law are necessary to minimise the consequences of this disruption.[167] There are two main forms of state succession: partial and universal. In the former, a state loses is sovereignty over a part of its territory but an entity survives in which rights and duties remain constant.[168] In the latter case, a state ceases to exist and the rights and duties become invested in the new entity.[169]

It has to be borne in mind that in Crimea only a partial succession could take place, because the predecessor state still exists. In the case where partial state succession exists, there is a surviving person to whom antecedent rights and obligations may still be attributed.[170] In the Crimean case, Ukraine would be the predecessor state and Russia the successor state.

There are several concepts which determine the legal consequences of state succession. The first – based on Roman law – considers the continuity of the legal personality in the estate which is passed on by inheritance.[171] The contrary

[166] Bennett & Strug (note 38) 256.
[167] DP O'Connell. 1970. *International Law* (2 ed). London: Stevens and Sons, 365.
[168] O'Connell (note 167) 366.
[169] Ibid; Bennett & Strug (note 38) 256.
[170] O'Connell (note 167) 365.
[171] M Shaw. 2008. *International Law.* Cambridge: Cambridge University Press, 957.

approach follows the idea that there is no transfer of rights, obligations or property from the predecessor state to the successor state.[172] It is import that the question of state succession be distinguished from the question of succession of governments. In the latter case, whatever changes occur in the officers or form of government, the state is unaffected. Changes in government include both changes through the usual democratic elections under the constitution and through non-constitutional means.[173] The new government will continue to be bound by the rights and obligations created by the old government.

The important rules when it comes to the law of state succession are found in customary international law and two relevant conventions: the Vienna Convention on Succession of States in Respect of Treaties of 1978 (which entered into force in 1996) and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983 (which is not yet in force, but is reflected in the rules of customary international law).[174]

One of the main problems in the field of state succession is the question of what the consequences of the succession on treaties are to which the predecessor state was a party. With regard to the influence of succession to treaties, it is important to distinguish between the different forms of state succession. In the case of Crimea the consequences of partial succession have to be examined: customary law and art 15 of the Vienna Convention on Succession of States to Treaties provide that the general rule is that the treaties of the predecessor state cease to apply to the territory under new sovereignty, while the treaties of the successor state extend to the territory.[175]

Lastly, the rules that are in place with regard to succession to state property should be mentioned. The key rules are provided by customary international law.[176] The general rule postulates that only the property of the predecessor state passes automatically to the successor state.[177] The relevant law for determining what

[172] O'Connell (note 167) 367.
[173] Bennett & Strug (note 38) 258.
[174] Shaw (note 171) 959.
[175] Shaw (note 171) 973.
[176] Shaw (note 171) 987
[177] Ibid.

state property comprises is the municipal law of the predecessor state. According to art 8 of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, "state property" means "property, rights and interests, which, at the date of succession of states, were, according to the internal law of the predecessor state, owned by that state". This rule provided by international law applies not only to immovable property; it also applies to movable property.[178]

After this overview of the relevant rules of state succession law, in the following section the focus will be at the rights and nationality question in the case of a valid Crimea succession.

4. Citizenship and Rights of the Population under the Law of State Succession

The act of state succession is not only a major change in terms of sovereignty; it also affects the inhabitants of the assigned territory.

First, it has to be clarified what nationality the inhabitants of the territory which changed its sovereignty will have. The terms under which a state can grant nationality are solely under its control. In the case of partial succession, the issue of nationality will generally depend on the domestic law of the predecessor and the successor state. The laws of the former will determine the extent to which the inhabitants of an area to be ceded to another authority will retain nationality after the change of sovereignty, whereas the laws of the successor state will prescribe the conditions under which the new nationality will be granted.[179] In general, the rules provide that the inhabitants of the territory in question take the nationality of the successor state.[180] But it also possible that the predecessor state puts rules into force which provide that the inhabitants retain their original nationality. Therefore the situation of dual nationality can be created. The state practice often depends on the actual circumstances, because sometimes nationality is also granted automatically.[181] It should be noted that the 1961 Convention on the Reduction of Statelessness provides that states involved in the cession of territory should ensure

[178] Shaw (note 171) 990.
[179] Shaw (note 171) 1004.
[180] Bennett & Strug (note 38) 263.
[181] Shaw (note 171) 1005

that no person becomes statelessness as a result of change of sovereignty.[182] Russia's position with regard to nationality was that Crimeans could apply for Russian nationality up to a certain day. On the other hand, Ukraine assured the Crimean inhabitants that they would not lose their Ukrainian citizenship. Consequently, a situation of dual nationality can exist.

Besides the question of nationality, we have a look at the human rights situation that would exist if the secession of Crimea were to be valid. In that case, the inhabitants of Crimea would be entitled to the benefits of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as of the ECHR, because these treaties apply to the entire territory of Russia, protecting all persons which are subject to the territorial jurisdiction of Russia.[183]

However, not only nationals of the predecessor state would be inhabitants and therefore affected by the act of state succession. It is also important to consider the effect on the acquired rights of foreign nationals and if there is a change of treatment of foreigners. An "acquired right" is any legal interest, other than the personal freedom to pursue an avocation, which is reducible to monetary terms.[184] Included are real and personal estates of all kinds, whereas political and certain economic advantages are not included.[185] It is one of the fundamental principles of international law that the acquired rights of foreigners must be respected.[186] In the case of state succession this means that the change of sovereignty has no effect on such rights.[187] The extent of protection extends so far that if, for example, a foreign national's property is involved in a dispute; a diplomatic claim may be made if the successor state does not respect it.[188] However, after a transfer of sovereignty the successor state may expropriate private property rights to an extent permitted by international law.[189] But the state must not only respect the property rights of foreigners; it is also bound by the principle enshrined in the "Minimum Standard of Treatment of Aliens". The origins of this principle were

[182] Ibid.
[183] Bothe (note 96) 105.
[184] O'Connell (note 167) 378.
[185] Ibid.
[186] O'Connell (note 167) 377.
[187] Ibid.
[188] O'Connell (note 167) 379.
[189] O'Connell (note 167) 380.

developed by Hugo Grotius and are based primarily on natural law.[190] The Minimum Standard is defined by the Organisation for Economic Co-operation and Development (OECD):

> as a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practice, must respect when dealing with foreign nationals and their property.[191]

Russia is also obliged to respect the international minimum standard of treatment of aliens. This was set out in *LFH Neer and Pauline Neer (USA) v Mexico* (*Neer* case):

> the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty or to an insufficient of governmental action so far short of international standards that every reasonable and impartial man would readily recognise its insufficiency.[192]

In connection with the treatment of foreigners, the international standards are still in force, as both Ukraine and Russia are bound by them. Importantly, the diplomatic protection is still in force. It has merely been altered by the fact that the offending state is now Russia.

Because in the situation of state succession, a new legal system is being introduced in terms of which special protection rules for the inhabitants of the ceded territory are not required. Unlike the case of belligerent occupation – a temporary control of another government over a foreign territory – the situation under state succession is permanent. After a while, the inhabitants usually become citizens of the succession state and under the jurisdiction of the domestic law. There are no special needs for the international-law system to intervene to protect.

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[190] AS Mussi. 2008. *International Minimum Standard Treatment.* Available at https://asadip.files.wordpress.com/2008/09/mst.pdf (accessed 10 January 2016).

[191] OECD Directorate for Financial and Enterprise Affairs. 2004. Working Papers on International Investment No 3. *Fair and Equitable Treatment Standard in International Investment Law*, 8 note 32.

[192] The Commission. 15 October 1926. *LFH Neer and Pauline Neer (USA) v Mexico* 4 RIAA 60 at 61–62.

5. Comparison between the Law of Occupation and the Law of State Succession

After introducing the law of occupation and the law of state succession, with a respective focus on the citizenship and rights of the inhabitants of Crimea, the comparison has to be made. First, the impact on the nationality is compared. In the following section we compare the human rights situation, certain provided rights, and the treatment of foreigners. Finally, the advantages and disadvantages of the respective legal field in terms of Crimea are examined.

The first comparison to make is the impact of occupation and state succession on the nationality of the inhabitants. In the situation of belligerent occupation the inhabitants usually remain nationals of the predecessor state. In the case of Crimea, one has to bear in mind that Russia introduced Russian citizenship to Crimea, which forced the Ukrainian government to allow an exception to the law of citizenship. The law provides that Crimeans do not lose their Ukrainian nationality even if they hold Russian passports. They therefore have the advantage of dual citizenship. In contrast, the law of state succession provides that the inhabitants of the former state become citizens of the successor state. But such a situation does not appear even in the event of a valid succession of Crimea because Ukraine is granting nationality to the inhabitants of Crimea. Therefore the situations do not differ as regards to citizenship: in both situations the nationals have the chance of dual citizenship.

In what follows, the human rights situation is compared. It is accepted in international law that, even if human rights law and the law of occupation are different areas of law, they are applicable at the same time. Human rights law and the law of occupation have the benefit that they can complement each other and fill gaps if a lack of protection occurs in one of them. Furthermore, it can be stated that for the application of human rights guarantees it is irrelevant whether the succession of Crimea was invalid or valid, because Russia signed the ICCPR or

ECHR. Therefore the inhabitants can invoke their human rights in the same way they could do in the case of a belligerent occupation.[193]

It should be mentioned that some scholars do not agree with founding the application of the human rights law in both legal fields equally. Their concern is raised that the merging of human rights law into IHL rather than expanding human protection may serve to undermine it as well as to legitimise violations of the rights of the inhabitants living under occupation.[194] It is argued that the introduction of a rights analysis into the context of occupation abstracts and extrapolates from the context of occupation and puts all involved persons – citizens of the occupying state and people living under occupation – on a supposedly equal plane.[195] This move weakens the equilibrium of the law of occupation, whose original purpose is the special protection of inhabitants of the occupied territory and widens the justification for limiting their rights beyond the scope allowed in a strict IHL analysis.[196] Up to this point those concerns can be raised, but the actual undermining of the law of occupation by human rights law is not yet a fact. Rather one must lay the focus on the ICJ Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[197] and on the judgment in the *Congo* case.[198] The ICJ considered the possibility that actions can be judged not only under the law of occupation but also under the human rights law. The inhabitants therefore enjoy the same amount of protection of their human rights, regardless of the validity of the alteration of the territory of Crimea.

Next, I examine whether the actual rights provided by the areas of law differ in some way. On the one hand, the HR and GC IV provide for the rights of inhabitants of occupied territory. Examples of these rights are the rights to life, property and religious practice in art 46 HR and art 27 GC IV or the right of human treatment in art 32 HR, which includes the prohibition of torture. All these provided rights have in common is that they have a strong human rights nature. These given rights ensure a minimum standard of protection. In addition, the

[193] Bothe (note 96) 105.
[194] AM Gross. 2007. Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation? *European Journal of International Law* 18(1): 5.
[195] Gross (note 194) 5.
[196] Ibid.
[197] ICJ (note 117).
[198] ICJ (note 157).

domestic law, for example, the domestic criminal law, of the former sovereign applies in the occupied territory. If the succession were valid, Crimea would be a part of the Russian Federation and the Russian Constitution and Russian domestic law would apply. The Russian Constitution provides similar rights to the HR and GC IV. For example, art 20 constitutes the right to life; art 21 provides that nobody should be tortured or treated inhumanely. But in the situation of state succession a whole new legal system will be introduced to a territory. This will cause a lot of confusion in the beginning, but seen in the long term can lead to more legal certainty than the law of occupation in the convergence with human rights law and the domestic law of the seceded state.

Furthermore, the treatment of aliens can be distinguished between that in occupied territory and the situation resulting from state succession. According to the HR, all the inhabitants of an occupied territory can invoke the rights provided by the Convention. The HR does not distinguish between certain groups of people, which means aliens are treated the same as everybody else under the HR. Under the requirements of art 4 GC IV foreigners can be determined as "protected persons". In this regard, art 48 GC IV states that:

> Protected persons, who are not nationals of the Power whose territory is occupied, may avail themselves of the right to leave the territory subject to the provisions of Article 35.

This provision applies specifically to foreigners in occupied territory.[199] But even if foreigners are not covered by art 4 GC IV, there is an applicable protection system. First, the ordinary law of the predecessor state remains applicable;[200] this means that if violations take place, the home state (ie the state in which an individual is a national) can also take steps to protect its own citizens. In terms of international law this means that states have to adopt measures of diplomatic protection. Furthermore, arts 13–26 GC IV also apply to all foreigners, even if they are not included in art 4 GC IV, because these articles relate to all the

[199] M Jacques. 2012. *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law.* New York: Cambridge University Press, 171.
[200] K Gasser & H-P Dörmann. 2013. Protection of the Civilian Population. In D Fleck *The Handbook of International Humanitarian Law* (3 ed). Oxford: Oxford University Press, 525.

inhabitants of a territory.[201] Additional protection is also provided by art 75 Additional Protocol I of GC IV:

> In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

The situations of refugees in occupied territories should now be considered briefly. Because refugees are not a particular threat to the occupying power, they have to be treated like any other foreigner in an occupied territory.[202] In particular Russia, as the occupying power in Crimea, has to respect the asylum law, which was in force before the occupation began.[203] It is also acknowledged that refugees are protected person in terms of art 4 GC IV and that – by extension of art 48 GC IV – refugees can also invoke the rights provided by this article.[204] In situations of state succession the international minimum standards for the treatment of aliens apply; this was argued in the *Neer* case. This standard requires proper respect for the life, liberty and property of aliens.[205] It is also supported by the UN General Assembly Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live.[206] In regard to "diplomatic protection", it is to be noted that in the case of its actions in Crimea, Russia is now the offending state. Furthermore, the acquired rights of foreigners, which they could claim before the incursions took place in Crimea, must be respected by Russia. The law applicable to refugees in Crimea is now the Russian asylum law. It should be noted that in both circumstances the mechanism of diplomatic protection applies. Furthermore, it can be stated that twice the effort is reconcilable to introduce a minimum standard of protection for all kinds of foreigner, besides the

[201] Ibid.
[202] Jacques (199) 171.
[203] Ibid.
[204] Ibid.
[205] Benett & Strug (note 38) 177.
[206] United Nations General Assembly. 13 December 1985. Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live. UN Doc A/RES/40/144.

international minimum standard. In addition, refugees are protected in both legal systems. From the perspective of an inhabitant who is a foreigner in occupied Crimea it barely makes any difference whether the territory is occupied or a form of state succession took place. The level of protection is high because of the diplomatic protection foreigners and refugees receive.

(a) The Advantages and Disadvantages of the Law of Occupation and the Law of State Succession

Finally, one must compare and analyse the respective advantages and disadvantages of the two legal systems. Initially, the advantages of state succession have to be examined. The acceptance of state succession has the advantage of a reduced potential for conflict and therefore the risk of an ongoing war for future decades is lower than that in other regions of the world. The lower potential for conflict stems from the fact that Crimea has been – from a historic point of view – part of Russia and it became a part of Ukraine only because Khrushchev assigned it to Ukraine. Out of this historic solidarity the strong sympathy for Russia in this region stems. The degrees of sympathy are also indicated through the social structures on the peninsula: a large percentage of inhabitants are Russian passport-holders or at least speak Russian. Such a result is underpinned by the referendum, which was held in February 2014. Independently of the legality of the referendum there is reason to believe that a large percentage of inhabitants voted in favour of integration into the Russian Federation.[207] Russia also has a strong economic influence in this region, which reduces the potential for conflict. Another factor that cannot be discounted is the fact that Russia has stationed her Black Sea Fleet in Crimea. There is a constant accumulation of Russian forces in this region, which has an intimidating influence.

To put Crimea in a position of a potentially high conflict area through comparison with the Israel–Palestine conflict is misplaced, because these conflicts differ considerably. First, the Crimea conflict is not characterised by religious fanaticism but rather by nationalist tensions. On the other hand, is the ongoing conflict of a

[207] https://www.rt.com/news/crimea-vote-join-russia-210/, accessed on 29.2.2016.

shorter period of time and the boundaries are not that hardened. A final point which as to be mentioned in the context of the advantage of reduced potential of conflict is the fact that Russia is one of the world powers. The pressure Russia can put on opposition tendencies is great, added to which is the prospect of a military conflict with Russia. All these points influence the assumption that state succession would lower the potential for conflict.

A second advantage of the hypothetical assumption that a state succession took place in Crimea is that in such a situation a uniform legal system would have been introduced. The takeover of the Russian legal system first would mean that the new territory does not have to produce its own new legal system. In the case of introducing a new legal system the drafters of the law often face a clash of interests between different represented groups, which could lead to an unsatisfying result. Furthermore, the already existing legal structures could be adopted. This would also lead to a reduction in administrative structures, which would reduce costs. Importantly, it has to be mentioned that a takeover would mean that access to the ordinary courts would be both fast and controlled. However, the most important aspect of this advantage is the high level of legal certainty, which goes along with a situation of state succession. Legal certainty is based on the clarity, resistance, predictability and warranty of legal norms, specific legal obligations and rights. Legal certainty should encourage in the population a higher trust in the legal system. Such an effect cannot be created in a situation of belligerent occupation, because of the parallel application of areas of law and the different existing responsibilities.

The last advantage of state succession is the fact that the treatment of aliens is internationally regulated. This further encourages legal certainty. Legal certainty, as we have seen, is an important factor when it comes to the advantages of state succession. The certainty of a functioning legal system should not be underestimated after a conflict, where force was used and a lot of people had to suffer rights violations.

On the other hand, one cannot deny that there are also disadvantages, from the perspective of the inhabitants of Crimea, that arise if one assumes the actions in Crimea as a valid state succession. The first disadvantage is the danger of the oppression of minorities. This arises from the fact that several different ethnic

groups are present in Crimea. The fact that the Russians, not the Ukrainians, are now in power increases the concern about oppression as it highlights Russia's handling of minority groups in the past. This concerns not only oppression during the time of the Soviet Union, but more recent examples such as that of the Chechens in the 1990s. Furthermore, Russia and the Crimean Tartars share a special history going back to the beginning of the 19th century, when the Crimean Tartars were the majority group in Crimea. In the 1930s, they constituted a relative majority in the region's government and were recognised as a separate nation in legal acts of the Russian Empire and the USSR.[208] In May 1944, however, the mass deportation of Crimean Tartars took place. In the later years they had to face further restrictions, for example with regard to their residence and their property.[209] It was not until 1988, when indications of the breakdown of the USSR first appeared, that a mass return of Crimean Tartars to the peninsula took place.[210] On 14 November 1989, the USSR Supreme Court decided in an official declaration that the deportation of Crimean Tartars had been illegal.[211] Because of their history of deportations, representatives of the Crimean Tartars are concerned that such acts may happen again. The danger is also that renewed oppression of minority groups would automatically increase the likelihood of potential conflict in this region. It should be in Russia's interests that such a development does not occur.

From the position of the inhabitants of Crimea another disadvantage of state succession is the attitude of Russia towards human rights. Russia signed the Universal Declaration of Human Rights and other conventions, for example, the ICCPR. However, human rights organisations have reported many violations of human rights. In the Caucasus region in particular, people suffer torture, discrimination and arbitrary detention. The organisation "Freedom House" evaluates Russia as a "not-free" country. During the 2014 Soyi Olympic Games the Western media received a first-hand impression of how freedom of speech and

[208] BV Babin. 2014. Rights and Dignity of Indigenous People of Ukraine in Revolutionary Conditions and Foreign Occupation. *Anthropology & Archeology of Eurasia* 53(October): 3, 84.
[209] Ibid.
[210] Babin (note 208) 85.
[211] Ibid.

homosexual people are treated.[212] Human rights violations in Crimea therefore cannot be ruled out.

Besides introducing the advantages and disadvantages, one must also illustrate the advantages and disadvantages of the law of occupied territory from the perspective of the Crimean inhabitants. In what follows, I examine the advantages of the law of occupied territory. The first is that the Crimea is under intense international observation, the reasons for this being the ongoing conflict between Ukraine and the pro-Russian rebels in the eastern region of the Ukraine and international agreement that the Crimea has the special status of occupied territory. Under international observation the inhabitants must have less fear of radical changes in law and society being introduced. In this connection, a comparison with the Israel–Palestine conflict is possible, because here the parties also argue about the status and the consequences of Israel's actions, which are continuously under international observation. This observation ensures that the issue is forever present and discussed in international law and at peace conferences. Furthermore, the international media attention is still intense, which increases the international observation. For the inhabitants it is accompanied by a sense of protection: Russia has to be careful what kind of measures it will introduce to the region. If some of these measures are in opposition to the international view, Russia will have to face international sanctions and the danger of potentially increasing conflict. The international observation will not cease as long the conflict in Eastern Ukraine remains unresolved and incidents such as the shooting down of a KLM aircraft occur.

Another advantage of the law of occupation is the human rights character of the rights provided for in the HR and GC IV. The human rights character of the rights holds a great benefit for the inhabitants and secures a standard of protection. The protection standard is quite high because of the international character of human rights and concerns about their scope of protection. In this connection it can be seen as a further advantage that not even the law of occupation in influenced by human rights, but also the fact the human rights law itself is applicable in occupied territory. This increases the protection of the inhabitants further. An independent applicable area of law, which is under the control of international

[212] http://espn.go.com/olympics/winter/2014/story/_/id/10314120/gay-protester-detained-russia-sochi-olympics-torch-relay, accessed on 29.2.2016.

community, strengthens the rights of the Crimean population. Furthermore, the human rights law can fill gaps in protection in the law of occupation; such a gap-filling duty occurs, for example, regarding the freedom of expression (art 10 ECHR and art 19 ICCPR). In the law of occupation there is no equivalent to such a right.[213]

A third advantage of the law of occupation from the viewpoint of the inhabitants is that the law attaches importance to continuity of law. The inhabitants benefit in the way that the conversion to a new legal system is not that substantial. In the situation of occupation a final decision about the future legal system of the territory does not have to be made. In the case of an end to occupation, the way back to the former legal system is also easier. Ultimately, the confusion among the population about the applicable law is less.

Finally, the advantage of the dual nationality has to be mentioned. The inhabitants of Crimea will not face a loss of nationality: remaining Ukrainian has the advantage that Crimeans can travel or move to the territory of Ukraine without facing any limits set by the Ukraine government.

By way of contrast, there are also disadvantages. For the inhabitants it is detrimental that in the international community there is disagreement about the legal status of the territory and therefore the applicable law. On the one hand, the Western community claims the status of occupation and, on the other hand, Russia introduces measures into the region, implying that Crimea is a territory of the Russian Federation. From this disagreement the inhabitants of Crimea can be confused about what kind of law applies to them, what demands they can put forward and who can enforce them. The disadvantage of the dual applicable legal systems has the same effect. On the one hand, there is the law of occupation and, on the other, human rights law. This problematic area leads to the danger of legal uncertainty. As long as there is legal uncertainty the inhabitants will have problems in trusting the applicable law. The problem of legal uncertainty also makes it more difficult for the legal authorities to introduce the law to the population.

Another disadvantage of the law of occupation is the different degrees of protected persons in the HR and GC IV. Because of that, there is no uniform level

[213] Bothe (note 96) 106.

of protection for all inhabitants. This disadvantage further increases the danger of legal uncertainty. In addition, the law of occupation is a limited area of law: the rights provided are limited to a minimum of protection and are also a duplication of what is in the HR and the GC IV. These rights are aimed to secure the physical integrity and human dignity of the people living in the occupied territory. And it is no wonder that the law of occupation cannot provide for the number of rights and enforcement measures in comparison to the entire legal system of a state.

As the last disadvantage, an increased risk of the potential for conflict can be mentioned. The law of occupation is designed to apply only for a certain time – it is not intended as a lasting solution. Moreover, one has to consider the different ethnic groups living in Crimea. With the certainty that the current situation is permanent, different groups will start to gain power over territory and position themselves for the time when the occupation has ended; such a situation can at worst lead to civil war.

(b) Interim Conclusion

To come to a conclusion one can state that both alternatives can benefit the inhabitants of Crimea, but neither is free from disadvantages. Because the two areas of law do not have the same purpose, it is obvious that one's advantage is somehow the other's disadvantage. First, it has to be pointed out that the problem of legal uncertainty in the law of occupation does not occur to the same extent in the law of state succession. The law of state succession has the advantage that a whole functioning legal system applies to the new territory. On the other hand, however, the law of occupation attaches importance to continuity, which entails less conversion efforts for the inhabitants of Crimea.

But both areas of law have in common that they inherent conflict potential. Although the causes of a possible conflict are to be found in different reasons, in both instances they should not be underestimated. Therefore it can be concluded that neither of these areas of law is bringing about a major improvement in the lives of the inhabitants of Crimea. Both legal systems provide protections but also are sources of risk.

(c) Could be a Hypothetical Application of the Law of State Succession Legally Tenable?

After discussing and comparing the law of occupation and the law of state succession, in what follows it should be assumed for the purpose of the following argument, since both legal areas don't have major arguments in favour or against their application, that the law of state succession is the better one from the perspective of the inhabitants. The crucial question in this situation is: To what extent can legal arguments be put forward to underpin the proposed assumption? or Does the *de facto* situation override the *de jure* situation and therefore the international community has to apply the law of state succession in Crimea for the benefit of the civilian population?

Reasons for the assumption of a replacement lay in the idea, that the law of occupation can secure for a certain amount of time, but can't provide a satisfying solution for all parties for many decades. As a current example the Israel-Palestine-conflict can be mentioned. Furthermore the law of occupation is designed to apply for temporally amount of time, its purpose isn't to be conclusively applicable in a territory. Additionally could a comparison of the two legal system and the questioning of the law of occupation, at the end strengthening the law of occupation and leading to new developments.

There are several arguments that may support the proposed assumption. As a first argument, the fact can be put forward that in the case of a state succession the right of self-determination of Crimea's inhabitants will be fulfilled. Self-determination includes the right of a population of a territory to freely determine its future political status.[214] Following World War II it was doubtful whether the right was an enforceable part of international law,[215] and only during the process of decolonisation did the right gain full legal status. In the *Case Concerning East Timor* (*East Timor* case)[216] the ICJ declared it to be an essential principle of

[214] D Thürer & T Burri. 2008. Self-Determination. In R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law Online*. Avaailable at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873 (accessed 25 January 2016), para 15.
[215] Bennett & Strug (note 38) 211.
[216] ICJ. 30 June 1995. (*Portugal v Australia*) *Case Concerning East Timor*, para. 29.

international law[217] and therefore the principle can now be regarded as a part of international law.[218]

A large number of Crimeans are Russian sympathisers and supported the integration of the peninsula into the Russian Federation. In the Russian rebel-controlled referendum they voted in favour of integration and therefore freely expressed their desired future political status. The inhabitants of Crimea can also be seen as right-bearers, because they meet the requirements to be seen as one people. The first requirement is that the people in question must be separate, which implies a distinctive history and tradition.[219] The Crimeans have a special history and also had a special position in the relationship between Ukraine and Russia. Furthermore, their common language is Russian and not Ukrainian and the inhabitants are therefore a separate group of people. On the other side there is also a division recognisable. There is the nationality movement of the Tatars and the self-image of the ethnic Russians. But from a democratic perspective, which is inherent in the right of self-determination, the results of the referendum reinforced the idea that they see themselves as separate. [220] But in connection with this argument one has to keep in mind the limitation put forward by the Canadian Supreme Court in the *Quebec* case[221] that the right arises only in extreme cases. Such cases are former colonies or where people are oppressed and have no access to government to pursue their political economic and social rights.[222] In other cases, apart from those mentioned, states and the UN deny the right and it is expressly forbidden by the Declaration on Friendly Relations[223][224] As already indicated, in the past the Crimeans neither suffered any oppression nor had the status of a colony. On the contrary, Crimea had the status of an autonomous republic with its own government. Because the requirements of the right to self-determination are not fulfilled in the Crimean case, the argument cannot indicate that state succession should apply in Crimea.

[217] Bennett & Strug (note 38) 211.
[218] Bennett & Strug (note 38) 212.
[219] Bennett & Strug (note 38) 214.
[220] A Peters. 2014. Das Völkerrecht der Gebietsreferenden. *Zeitschrift Osteuropa* 64, 121.
[221] Quebec case (note 60**)** 2 SCR 217**.**
[222] Bennett & Strug (note 38) 215.
[223] United Nations General Assembly. 24 October 1970. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations – UN Doc A/RES/25/2625, 340.
[224] Bennett & Strug (note 38) 215.

Another legal argument could be that because of the actions taken by Russia and its allies and the duration of the occupation up to this point and in estimations, a customary law could emerge that regards the peninsula as resorting under the perspective of international law. In order to assume such a customary law exists, the necessary requirements for an international customary law need to be fulfilled. The main source of customary international law is the consistent practice of states. The fundamental concept is that if states act in a certain consistent way, then they are acting in such a way because they have a sense of legal obligation – *opinio iuris*.[225] If enough states perform in such an equivalent way, because of their conviction to being legally obliged for a long period of time, a new rule of international customary law is developed.[226] In the Crimean case, the question is therefore: Is there consensus in the international state community about the practice that after an occupation through the use of force and the opinion of the occupying power the occupied territory can be incorporated into that state?

In 1961 India took over the territory of Goa from Portugal by military force. The international community protested but no action were put forward by the UN.[227] The takeover was excused on the ground that the territory was part of India, which was accepted by the international community over the years.[228] Because originally Crimea was part of Russia, someone could assume a similar case to Goa occurred in Crimea.

On the other side Israel occupied the territory of West Bank and Gaza, because it considers that these territories belong to the Israelite population. But throughout the years and in several court decisions there has been no consensus about the fact that these territories are part of Israel. In fact, in the past years the increasing trend has been to consider Palestine as a state.[229] As an example for such a judgment can be mentioned the ICJ Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The court determined that:

[225] RB Baker. 2010. Customary International Law in the 21st Century: Old Challenges and New Debates. *The European Journal of International Law* 21(1): 176.
[226] Ibid.
[227] A Kaczorowska-Ireland. 2015. *Public International Law*. 5 ed. New York: Routledge, 268.
[228] Dinstein (note116) at 10.
[229] United Nations. General Assembly. 26. November 2012. Status of Palistine in the United Nations – A/67/L.28.

> the de facto annexation of land interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination.[230]

The Russian actions in South Ossetia in 2008 and in Crimea in 2014 also cannot be considered to be consistent state practice that supports such a customary international rule. This is because it is merely performed by one state and in the case of the South Ossetia, Russia withdrew her military forces and recognised South Ossetia as an independent state.

The example of the Turkish invasion of North Cyprus on 20 July 1974 is another instance of this situation, because the territory was not incorporated into Turkey, but instead the independent Turkish Republic of Northern Cyprus was declared. Unfortunately up to now the only state practice in regards to an acceptance of an annexation is the Indian invasion on Goa. But after the time of decolonisation further state practice in this regard doesn't exist. Without reasonable and consistent state practice the requirements for the development of a customary law are not met. There the propound argument can't support the raised question.

The next argument which may support the question is linked to the problem of prolonged occupation. It is a fundamental principle of belligerent occupation that the occupying power is vested with temporary power only and holds no sovereignty over the territory. But because the authors of the law of occupation considered short-term occupation only and not decade-long occupations, it can be claimed that the provisions are inadequate for regulating prolonged occupation.[231] It is agreed that the duration of occupation calls for special measures in the law of occupation.[232] Problems occur in connection with art 43 HR, which provides the occupant with legislative power in the scope of his or her duty to "restore and ensure … public order and civil life". This competence reaches its limits in situations of long-term occupation, because other issues arise and have to be solved through the law. Because of these problems, it is questionable which law should be applicable: At what point of the duration of occupation can the occupation be seen as annexation? The probabilities are great that the occupation

[230] Supra note 119 at 115.
[231] I Scobbie. 2015. *International Law and the Prolonged Occupation of Palastine.* Available at http://ssrn.com/abstract=2611130 (accessed 12 December 2015), 2–3.
[232] International Committee of the Red Cross (ICRC). 2012. *Occupation and other Forms of Administration of Foreign Territory.* T Ferraro (ed). Available at https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf (accessed 30 January 2016), 72.

of Crimea is going to last for a long time and has to be regarded as prolonged. On the basis of the occurrence of another prolonged occupation and the problems that could lead to, it is more necessary than ever to develop new rules to deal with such situations. Because of the symbiosis of prolonged occupation and annexation, the rules of state succession could be consulted.

This argument can be extended even further if we accept that prolonged occupation is illegal, because it is not provided for by the rules of IHL. To fill this gap it is also necessary to apply the law of state succession. On the other hand, some scholars argue that even the law of occupation was designed for short-term occupations. IHL sets no time limits for occupation and therefore prolonged occupation problems can be solved within the existing IHL rules.[233] In this regard, art 43 HR is indeed a limitation on the legislative competence of the occupant, but nonetheless the parameters of this competence are flexible and open to interpretation.[234] Furthermore, the concepts cannot be seen as definite, because the notions depend on the actual circumstances.[235] To examine, whether the occupying power crosses the boundaries of art 43 HR, scholars want to use the "litmus test".[236] The basic idea behind the test is the distinction between the wellbeing of the local population and whether the occupying power also shows similar concern towards the welfare of its own population.[237] Therefore, the lawfulness of the legislation aimed at improving the situation of the local population should be measured against the existence of its equivalent in the territory of the occupying state.[238] Should similar pieces of legislation not be in force in the occupant's own territory, the measures would be considered not to have been introduced effectively for the welfare of the occupied population and therefore presumed to be unlawful for the purposes of occupation law.[239] A further counter-argument is that it would be contradictory to use the law of state succession in such a situation, because it is precisely the purpose of the law of occupation to find an end to the ongoing occupation. This purpose cannot be realised if the law of state succession applies.

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[233] Ibid.
[234] E Schwenk. 1944–1945. Legislative Power of the Military Occupant under Article 43, Hague Regulations. *Yale Law Journal*, 399–400; Scobbie (note 231) 15.
[235] Schwenk (note 234) 400.
[236] ICRC (note 232) at 74
[237] ICRC (note 232) 74.
[238] Dinstein (note 114) 120–123.
[239] ICRC (note 232) 74.

Russia introduced a nationalisation programme in Crimea, the key point of which was the introduction of the Russian passport to the inhabitants of Crimea. Through this programme many Crimeans are now Russian and therefore citizens of the occupying power. Even if the western community don't confirm such actions, they have to accept the nationalization and since the ICJ judgment in the *Nottebohm Case*[240], that Russia is exercising right of diplomatic protection. The ICJ demands that there must be a

> strong factual tie between the person concerned and one of the states whose nationality is involved.[241]

To determine strong ties different factors has to be considered, such as habitual residence of the individual, family ties and participation in public life.[242] The consequence of being a citizen of the occupying power is the loss of status of a "protected person" under the scope of GC IV. Article 4 GC IV defines "protected persons" as:

> those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in hands of a Party to the conflict or Occupying Power of which they are not nationals.

Because of this, GC IV no longer applies to them and this means that the law of occupation is only partially applicable. Only the HR does not distinguish between the different possible categories of inhabitant. However, the part application of the law of occupation is an unsatisfactory result. As an alternative, the law of state succession could apply. Because Russia introduced the opportunity to get an Russian passport, many Crimeans took this opportunity. As a result Russian law applies to them and they are under diplomatic protection of Russia. Though the holding of the Russian passport express their ties to Russia. The situations also differ, because the inhabitants usually resist assuming the nationality of the occupying state. On the other hand, one has to except that a situation or the principle that the *de jure* situation has to evade the *de facto* situation has not developed in the field of international law, even if the inhabitants of the vacant territory sympathize with the invading power. The principle could have been applied in the Israel–Palestine conflict, but even there the law of occupation still

[240] ICJ. 6. April 1955. (Lichtenstein v. Guatemala) *Nottebohm Case.*
[241] Supra note 240 at 22.
[242] Supra note 240 at 22.

applies. Although it can be argued with the Indian invasion of Goa, that the international community accepts annexations, the recent cases doesn't confirm such a state practice. The requirements for the development of a new principle in international law, which are state practice and *opinion iures*, are not meet here. Furthermore, the acceptance of such a principle would cause immense problems, because all over the world states would occupy territory in order to gain new territory without having to fear the applicability of the law of occupation. That would open Pandora's box and would be contrary to the purpose of international law, which is to uphold the security of interstate peace, international security as well as the security of the foundations of human existence.[243] This purpose cannot be reached by means of a principle which accepts that the *de jure* situation has to evade the *de facto* situation.

It can be concluded that there are several legal arguments which support the thesis that the law of state succession should apply for the greater good of the inhabitants of Crimea. However, these arguments cannot persist on the basis of international law.

E Conclusion

Since 2014, the activities in Crimea have affected the conduct of international law. In the beginning, considerable discussion took place about the lawfulness of the Russian actions. The discussion peaked when the compact between Russia and Crimea concerning the integration of the peninsula into the Russian Federation was put in place. After Russia presented the Western state community with an accomplished fact, the focus of international law shifted to the discussion about the legal consequences of Russia's action.

After introducing Crimea and giving an overview of the events which occurred at beginning of 2014, the incidents were analysed from the perspective of the international law. It can be asserted that the use of force by Russia was illegal and that no grounds for its justification exist.

[243] G Hoffmann. 1981. Von der Brauchbarkeit des Völkerrechts in unserer Zeit. In I von Münch (ed) *Staatsrecht, Völkerrecht, Europarecht: Festschrift für Hans-Jürgen Schlochauer zum 75 Geburtstag.* Berlin: De Gruyter, 365.

With reference to the referendum, holding a referendum is not prohibited by international law; however, it has to be in line with the principles of international law and cannot be seen as legal title for a territory change.

Finally, the integration treaty does not comply with international law. The integration has to be seen as annexation and therefore unlawful. It can be determined that even effective control by a foreign military force can never by itself bring about a valid transfer of sovereignty[244] and Crimea is therefore an occupied territory. International law covers occupation through the law of occupation and the main set of rules in these circumstances are the HR and GC IV.

By way of contrast with the law of occupation, the law of state succession would apply if we were to assume that the annexation was legal. From the perspective of the inhabitants of Crimea it makes no difference whether the law of occupation or the law of state succession applies. But there are no legal arguments that can support the assumption that instead of the law of occupation the law of state succession should apply.

Accordingly, the international community has to accept the *de jure* situation and has to abide by the rules provided by the law of occupation. But, as we have seen, the rules are inadequate when the occupation endures for many years. With regard to a prolonged occupation, changes to international law are therefore required. Furthermore, it appears necessary that both the HR and GC IV should provide the inhabitants with the same level of protection.

Apart from that, one must await further developments in this region. So far no new conflicts have occurred here, apart from the ongoing battles in Eastern Ukraine. As long as that conflict remains unresolved, the potential for conflict exists in Crimea. A return to the situation prior to the 2014 action appears unrealistic at this point in time because Russia is in a strong position in Crimea, and so, from the point of view of international law, Crimea will remain an occupied territory for the foreseeable future. Although one can blame international law for its inflexibility, it is not necessary, however, for the benefit of the inhabitants of Crimea that the law of occupation has to or should evade the law of succession.

[244] Benvenisti (note 102) 6.

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